SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 180.

THE UNITED STATES, THOMAS SIMPSON, AND WHITE SWAN, APPELLANTS,

vs.

LINEAS WINANS AND AUDUBON WINANS, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF WINANS BROTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

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a UNITED STATES OF AMERICA, THOMAS SIMPSON, and WHITE SWAN, complainants,
vs.
LINNEAUS WINANS AND AUDUBON WINANS, PARTNERS as Winans Brothers, defendants.

Transcript of record on appeal from the United States circuit court for the district of Washington, southern division, to the United States Supreme Court.

1 No. 122.

U. S. circuit court, ninth circuit, district of Washington.

THE UNITED STATES ET AL. *vs.* JOHN DOE WINANS ET AL. } In equity.

Subpœna.

Filed July 31st, 1895. A. Reeves Ayres, by W. H. Kirkman, deputy.

2 United States of America, circuit court of the United States, ninth judicial circuit, district of Washington, in equity.

The President of the United States of America, greeting, to John Doe Winans and Richard Roe Winans, partners, doing business under the firm name of Winans Brothers.

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court room in Walla Walla, on the 5th day of August, A. D. 1895, to answer to a bill of complaint exhibited against you in said court by The United States of America, Thomas Simpson and White Swan, who are citizens of the United States, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 11th day of July, in the year of our Lord one thousand eight hundred and ninety-five, and of our independence the 120th.

[SEAL U. S. CIRCUIT COURT.]

A. REEVES AYRES, *Clerk.*
By R. M. HOPKINS, *Deputy.*

Memorandum pursuant to rule 12, Supreme Court, U. S.: You are hereby required to enter your appearance in the above suit on or before the first Monday of August next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

A. REEVES AYRES, *Clerk.*
By R. M. HOPKINS, *Deputy Clerk.*

3 UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF WASHINGTON.

I hereby certify that I received the within writ on the 24th day of July, 1895, and personally served the same on the 27 day of July, 1895, by delivering to and leaving with John Doe Winans and Richard Roe Winans, said defendant named therein, personally, at the Summit, on the Columbia River, county of , in said district, a true copy thereof.

JAMES C. DRAKE, *U. S. Marshal.*
By FRANK J. PARKER, *Deputy.*

31st day of July, 1895.

4 No. 122.

In the U. S. circuit court for the district of Washington.

UNITED STATES ET AL.
vs.
JOHN DOE WINANS ET AL.

Bill in equity.

Wm. H. Brinker, attorney for plffs., 506 Coleman Blk., Seattle.
Filed July 11, 1895, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

5 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and WHITE SWAN, plaintiffs,
against
JOHN DOE WINANS AND RICHARD ROE WINANS, partners doing business under the firm name of Winans Brothers, defendants.

To the judges of the circuit court of the United States for the district of Washington:

The plaintiffs complain of the said defendants, and for their cause of action say:

I.

That on an prior to the 9th day of June, 1855, the said plaintiffs, Thomas Simpson and White Swan, were, ever since have been, and still are Indians, born in the United States, and members of the Yakama tribe or nation of Indians, and sue in this behalf for themselves as well as for all other Indians of said Yakama tribe or nation of Indians similarly situated.

II.

That for many years prior to the 9th day of June, 1855, the Yakama Indians, and other Indians mentioned in the treaty hereinafter referred to, were in the possession of and claiming and asserting title to all lands bordering on the Columbia River, on the north bank thereof where the said river runs through the lands now known and described according to the Government survey thereof as township two (2) north, of range fourteen (14) east, of the Willamette meridian, and other lands in Washington Territory. That at various points along the north shore of said
6 Columbia River in said township, the said plaintiffs, Thomas Simpson and White Swan, and the other Indians of said tribe known as Yakama, and other Indians and tribes of Indians, now known and designated as belonging to said Yakama nation of Indians, were accustomed every year from time immemorial to fish for salmon and other food fishes in the waters of said Columbia River, where the same flows through said township; and said Indians were also in the habit of and accustomed to build their houses and huts on the lands bordering on the shore of said river, in what is now known as said township two in said range fourteen, for the use of said Indians during the fishing season, and for the purpose of drying and curing the fish, which were caught by them at said times, for the use and subsistence of the said Indians and their families during the remainder of the year; and said Indians were also at said times in the habit of and accustomed to pasture their horses and cattle and other animals upon said lands bordering upon said river during said fishing season, and said Indians were also in the habit of and accustomed to have free and uninterrupted ingress and egress to and from said river and the fishing banks and grounds therein, from the adjacent territory, for themselves and their said animals. That on and prior to said 9th day of June, 1855, all the country, lands, and territory bordering on the north shore of said river within what is now known as said township two north, of range fourteen east, Willammetee meridian, and other adjacent lands was Indian country, and held, occupied, and claimed by the several tribes of Indians now known and designated by the name of the Yakama nation of Indians, and the possession, title, and right of possession of said Indians in and to said lands, territory, and country was recognized and admitted by the Government of the United States.

7 III.

That on said 9th day of June, 1855, the Government of the United States, desiring to acquire all the lands lying north of said Columbia River, in what is now known as township two north of range fourteen east of the Willamette meridian, and other lands adjacent and contiguous thereto, in Washington Territory, entered into a treaty, contract, and agreement with the said Indians, then in possession of said lands, said Indians now and in said treaty being known and designated by the name of the Yakama Nation of Indians, and particularly known and designated as the Yakama, Palouse, Pisquose, Wenatshapam, Klickatat, Kliquit, Kow-was-say-ee, Ly-ay-was, Skin-pah, Wish-ham, Syiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians,

occupying lands in said treaty described, lying in Washington Territory, and in said treaty considered as one nation under the name of Yakama, for the cession and transfer of the title and right of possession of said Indians in and to all of said lands, except such parts thereof as were in said treaty reserved and secured to said Indians for their use for the purposes mentioned in said treaty, to the United States. And on said day, at a place known as the Treaty grounds, in Walla Walla Valley, in the Territory of Washington, said treaty was made and entered into by the said United States, acting through and by one Isaac I. Stevens, then and there governor of said Washington Territory, and superintendent of Indian affairs in said Territory, as the representative of the said United States, on one part, and Kamaikun, Skloom, Owhi, Te-cole-kun, Lahoom, Me-ni-nock, Elit Palmer, Wish-och-kmpits, Koo-lat-toose, Sheeah-cotte, Tuck-quille, Ka-loo-as, Scha-noo-a, and Sla-kish, the head chiefs, chiefs, headmen, and delegates of the said Yakama, Palouse, Pisqnouse, Wanatshapam, Klickatat, Kaw-was-say-ee, Li-ay-was,
8 Skin-pah, Wish-ham, Shyiks, Oche-chates, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians occupying said lands, on the other part.

That in and by the terms of said treaty the said Indians ceded, relinquished, and conveyed to the United States all of the lands then occupied and claimed by said Indians in said Washington Territory, particularly described by metes and bounds in said treaty, save and except the lands in said treaty reserved for the use of said Indians for fishing purposes bordering on said Columbia River, and other lands in said treaty described for a permanent reservation for said Indians.

That as a part of the consideration for the cession, relinquishment, and conveyance of said lands to the United States by said Indians, the said United States guaranteed to the said Indians, and in and by said treaty secured, promised, and bound themselves to secure to the said Indians for their use, in common with the citizens of said Territory of Washington, the right of taking fish at all the usual and accustomed places along said river which had been theretofore used by the said Indians for said purpose, and also the right to erect temporary buildings for curing said fish on the lands bordering on said river adjacent to said usual and accustomed fishing places, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon any open and unclaimed land in that vicinity.

IV.

That said treaty was afterward submitted to the Senate of the United States, and by it ratified on the 8th day of March, 1859, and afterward, on the 18th day of April, 1859, the President of the United States accepted, ratified, and confirmed the said treaty, and proclaimed the same to be in force and operation from said day, by his proclamation in writing, issued on said last-mentioned day.

9 V.

That the said Indians of the said several tribes named in said treaty and known as the Yakama Nation of Indians, from the date of said treaty, as they had been accustomed to do prior to the making of said treaty, fished

with their nets and other primitive appliances and caught salmon and other food fishes at the places along the north shore of said Columbia River at divers places between the east line of section seventeen and the west line of section thirty-three in said township two (2) north of range fourteen (14) east of the Willamette meridian, and particularly at diverse points along the line of sections nineteen, twenty-five, and thirty in said township, where the said sections border on the north shore of said Columbia River, continuously, every season until they were interrupted, interfered with and prevented by the said defendants, as hereinafter stated.

And said Indians were also accustomed during all said time to use the lands bordering on said river in said sections for a convenient and reasonable distance inland for the purpose of erecting temporary houses, for the curing of the fish so caught by them during the fishing season, and for the use and shelter of said Indians during the time they were so engaged in catching fish; and they were also during all of said time accustomed to use the lands bordering on the said river in the vicinity of said fishing places for the purpose of pasturing their horses and cattle; and they were also accustomed during all of said time to have free and unmolested access to said fishing places across the lands lying between said fishing places on said river and their respective homes.

That the said fishing places along the north shore of said river, where the said sections nineteen, twenty-five, and thirty border thereon, were, at the date of said treaty, and for many years prior thereto, had been the usual and accustomed fishing places of the said Thomas Simpson and White Swan and said other Indians, and said fishing places were in contemplation at the time of the making of said treaty, and are mentioned and secured to said Indians therein.

VI.

That neither the said plaintiffs—Simpson or White Swan—or any other of the Indians of the said Yakama Nation, have ever since the date of the said treaty sold, assigned, transferred, or conveyed their right to the said fishing places or any part thereof.

VII.

That the said Indians of the said Yakama Nation are under the charges of an Indian agent and superintendent of the United States, and receive support, education, and protection from said United States, and sustain the relation of wards to said United States, and the said United States are and since the date of said treaty have exercised the rights, duties and authority to guardians to the said Indians.

VIII.

That this suit is brought and prosecuted by the authority and direction of the Attorney-General of the United States.

IX.

That the said defendants who are sued herein by the names of John Doe Winans and Richard Roe Winans, but whose true names are to plaintiffs unknown, but when ascertained plaintiffs pray leave to insert

herein, with apt words to charge them are, as plaintiffs are informed and believe, a copartnership doing business under the firm name and style of Winans Brothers.

X.

That notwithstanding the right of the said plaintiffs, Simpson and White Swan, and said other Indians of said Yakama Nation, to catch and take fish in common with the other citizens of the Territory,
11 now State of Washington, at said usual and accustomed fishing places on said Columbia River, the said defendants have contrived how to prevent the said plaintiffs Simpson and White Swan and said other Indians of said Yakima nation, from fishing, and catching and taking fish at said usual and accustomed fishing places on said river, where the said river runs through or along the border of said sections nineteen, twenty-five and thirty, in said township two north in said range fourteen east, and the said defendants by force, intimidation and threats and by assaulting said Indians, have driven the said Indians away from the said fishing places and have refused and still refuse to allow the said Indians or any of them to come to said fishing places, and catch or take fish, and have torn down and destroyed the temporary houses, erected by said Indians on lands near said fishing places for drying and curing their said fish, and have refused and still refuse to permit or allow the said Indians to rebuild the said houses, or any houses whatever on said lands, for the curing and drying of said fish, and have by threats of bodily harm and by actual assaults, and by force and intimidation driven the said Indians away from said fishing places on said river, and refuse to allow them or any of them to take fish at said places in common with the defendants and other citizens, or at all, and the said defendants still continue to prevent the said Indians from taking fish at said fishing places for any purpose whatever.

XI.

That the said Indians prior to the time when they were so molested and interfered with by said defendants, were accustomed to take fish with small dip nets, and other similar appliances, at certain places along the shore of said river, where said nets and appliances could be advantageously used. That owing to the peculiar formation of the
12 shore line, and the rocks thereof, the waters of said river were thrown into certain channels and eddys, in which the said Indians could and did use their nets and appliances effectively for taking fish; but that the said defendants in disregard of the rights of said Indians, and in defiance of the terms of said treaty, have erected and now are maintaining and operating at all the usual and accustomed fishing places of said Indians on said river in said sections above mentioned, large fish wheels, and by means thereof have wholly and entirely excluded and prevented said Indians from fishing and taking fish at said places at all.

That said fish wheels are so constructed and operated as to catch all the fish in usual runways of fish and to catch all the fish in the usual fishing places of said Indians.

That the presence and operation of said fish wheels prevents the said Indians from taking any fish at all at the said usual fishing places of

said Indians, and that said defendants have excluded, and still do exclude said Indians and all of them from said usual and accustomed fishing places and refuse to allow or permit said Indians or any of them to catch or take fish at said places.

XII.

That the plaintiffs had hoped that the said defendants would permit the said Indians to take fish at said usual and accustomed places on said river, and permit the said Indians to use and occupy the said lands bordering on said river at and near said fishing places for the erection of temporary houses for curing their said fish, and permit said Indians free ingress and egress to and from said fishing places over said lands; but now, so it is, the said defendants refuse to allow the said Indians or any of them to take fish at said fishing places, or to erect their houses for curing the said fish, or to cross the lands in going to and from said fishing places, and to color such refusal said defendants give out and
13 pretend that they have acquired from the Government of the United States by patent, or otherwise, the exclusive right and title to the lands bordering on said river at said fishing places, and the right to exclude the said Indians therefrom.

Whereas the plaintiffs charge that whatever right or title the said defendants have acquired to take fish at said fishing places is subject to the right of the said Indians to take fish at said places in common with said defendants and all other citizens of the State of Washington, and whatever right and title the said defendants have acquired to the lands in said sections bordering on said river, is subsequent, subordinate, and subject to the right of said Indians to use the said lands for the purpose of erecting temporary houses for the drying and curing of fish, and to the right of said Indians to pass over said lands peaceable to and from said fishing places, as secured to them by the terms of said treaty.

All which acts, doings, and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of the plaintiffs in the premises.

In tender consideration whereof, and for as much as the plaintiffs are remediless in the premises at and by the strict rules of the common law, and are relievable only in a court of equity where matters of this nature properly cognizable and relievable.

To the end therefore that the plaintiffs may have that relief which they can only obtain in a court of equity, plaintiffs pray that the said defendants and each of them may answer the premises but not upon oath or affirmation the benefit whereof is expressly waived by the plaintiffs, and that the said defendants, their counsellors, attorneys, solicitors, officers, agents, and servants may be restrained, by an injunction issuing out of this court, from further interfering with, molesting, or
14 preventing the said Indians from taking fish at said usual and accustomed fishing places on said river in common with other citizens of said State, and erecting and using temporary houses for drying and curing said fish, on the lands adjacent thereto, and having free access to and egress from said fishing places over the lands adjacent thereto, and that plaintiffs may have such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

May it please your honors to grant unto the plaintiffs a writ of subpœna directed to the said defendants, John Doe Winans and Richard Roe Winans, thereby commanding them, and each of them, at a certain time and under a certain penalty therein limited, personally to appear before this honorable court, then and there full, true, and direct and perfect answer make to all and singular the premises, and further to stand to perform and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

WM. H. BRINKER,
United States Attorney, Solicitor for Plaintiffs.

UNITED STATES OF AMERICA,
District of Washington, ss:

Thomas Simpson, being first duly sworn on oath, says: That he is one of the plaintiffs in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true; that he makes this affidavit in behalf of himself and all of the plaintiffs.

his
THOMAS x SIMPSON.
mark.

Witness to mark:
FRED MILLER.
J. K. MOCKLER.

Subscribed and sworn to before me this ninth day of July, 1895.

[NOTARIAL SEAL.]

FRED MILLER,
Notary Public in and for Washington, residing at North Yakima.

15 THE UNITED STATES ET AL., vs. JOHN DOE WINANS ET AL. } No. 122.

Affidavits—Charley Snowyer, Homer Hoffer, Wineas.

Filed July 11, 1895, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

16 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON and WHITE SWAN, plaintiffs, vs. JOHN DOE WINANS AND RICHARD ROE WINANS, partners, doing business under the firm name of Winans Brothers, defendants.

STATE OF WASHINGTON,
County of Yakima, ss:

This day personally appeared before me the undersigned notary public in and for the State of Washington, Charley Snowyer, who, having been first duly sworn by me, said upon oath:

That he is acquainted with the fishery known and designated as the "Tum Water Fishery," on the north bank of the Columbia River, in township two (2) north, range fourteen (14), east of the Willamette meridian; that he is an Indian, residing upon the Yakima Indian Reservation, and is under the control of an Indian agent; that he has been acquainted with the said fishery for a long time prior to the date of the treaty, to wit: June 9, 1855; that he has been acquainted with said fishery since said date and up to the present time; that the Indians have been accustomed every year to go there and fish for salmon in the waters of the said Columbia River, where the same flows through the township above designated; that said fishery was used without interruption by these Indians upand until the year of about 1888, when the defendants, Winans Brothers, took possession of the land upon which the Indians had pastured their horses while engaged in fishing every year, tore down the houses and sheds used by them to live in and cure and dry their fish, and placed fish wheels
in the channel where the Indians fished with their nets, and thus
17 prevented the Indians from fishing therein; that since the said defendants have fenced up the said fishery and the lands upon which their stock grazed about seven years ago, the Indians have not been permitted to do any fishing whatever, on account of the acts of the defendants in preventing them from entering into the enclosures, and the tearing down of the houses formerly occupied by them in cleaning and drying the fish and the placing of the fish wheels in the channel where the Indians were accustomed to fish.

Affiant further says that salmon were caught in great quantities every spring by the Indians at this fishery and were dried and cured in the houses which they had constructed, and when dried could be preserved by the Indians for about one year.

Affiant further says that the Indians had constructed a dip stand by the channel where the salmon came up the river where they caught the salmon in their nets; that the defendants have refused them access to the said dip stand, and have threatened them with violence in case they attempted to go into the inclosures which they have made upon the lands formerly occupied by the Indians to fish.

And further affiant sayeth not.

his
CHARLEY x SNOWYER.
mark

Witnesses to mark:
FRED MILLER.
J. K. MOCKLER.

Subscribed and sworn to before me this 9th day of July, 1895.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public for the State of Washington,
residing at North Yakima, Wash.

STATE OF WASHINGTON,
County of Yakima, ss:

Omar Hoffer, being first duly sworn, on his oath says: That he
18 acted as interpreter in preparing the foregoing affidavits; that he is acquainted with the Indian language, and truly and correctly

interpreted the foregoing affidavit to the Indian who subscribed his name thereto, before the same was signed by him, and truly and correctly interpreted the oath to him as given by the notary signing the same.

HOMER HOFFER.

Subscribed and sworn to before me this 9th day of July, 1895.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public for the State of Washington,
residing at North Yakima, Wash.

In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON and White Swan, plaintiffs,
vs.
JOHN DOE WINANS AND RICHARD ROE WINANS, partners, doing business under the firm name of Winans Brothers, defendants.

STATE OF WASHINGTON,
County of Yakima, ss:

This day personally appeared before me the undersigned notary public in and for the State of Washington, Wineas, who having first been duly sworn by me, said upon oath: That he is acquainted with the fishery known and designated as the "Tum Water Fishery," on the north bank of the Columbia River, in township two (2) north, range fourteen (14), east of the Willamette meridian; that he is an Indian residing
19 upon the Yakima Indian Reservation, and is under the control of an Indian agent; that he has been acquainted with said fishery for a long time prior to the date of the treaty, to-wit: June 9, 1855; that he has been acquainted with said fishery since said date and up to the present time; that the Indians have been accustomed every year to go there and fish for salmon in the waters of the said Columbia River, where the same flows through the township above designated; that said fishery was used without interruption by these Indians up and until the year of about 1888, when the defendants, Winans Brothers, took possession of the land upon which the Indians had pastured their horses while engaged in fishing every year, tore down the houses and sheds used by them to live in and cure and dry their fish, and placed fish wheels in the channel where the Indians fished with their nets, and thus prevented the Indians from fishing therein; that since the said defendants have fenced up the said fishery and the lands upon which their stock grazed about seven years ago, the Indians have not been permitted to do any fishing whatever on account of the acts of the defendants in preventing them from entering into the enclosures, and the tearing down of the houses formerly occupied by them in cleaning and drying the fish and the placing of the fish wheels in the channel where the Indians were accustomed to fish.

Affiant further says that salmon were caught in great quantities every spring by the Indians at this fishery, and were dried and cured in the houses which they had constructed, and when dried could be preserved by the Indians for about one year.

Affiant further says that the Indians had constructed a dip stand by the channel where the salmon came up the river where they caught the salmon in their nets; that the defendants have refused them access to the said dip stand, and have threatened them with violence in case they attempted to go into the enclosures which they have made upon
20 the lands formerly occupied by the Indians to fish. And further affiant sayeth not.

his
WINEAS X
mark

Witnesses to mark:
FRED MILLER.
J. K. MOCKLER.

Subscribed and sworn to before me, this 9th day of July, 1895.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public for the State of Washington,
residing at North Yakima, Wash.

STATE OF WASHINGTON,
County of Yakima, ss:

Omah Hoffer, being first duly sworn, on his oath says that he acted as interpreter in preparing the foregoing affidavits; that he is acquainted with the Indian language, and truly and correctly interpreted the foregoing affidavit to the Indian who subscribed his name thereto, before the same was signed by him, and truly and correctly interpreted the oath to him as given by the notary signing the same.

HOMER HOFFER.

Subscribed and sworn to before me this 9th day of July, 1895.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public for the State of Washington,
residing at North Yakima, Wash.

21 No. 122.

In the United States circuit court for the district of Washington.

UNITED STATES ET AL.
vs.
JOHN DOE WINANS ET AL.

Order to issue writ of injunction.

Filed July 11, 1895, in the U. S. circuit court. A Reeves Ayers, clerk. By R. M. Hopkins, deputy.

22 In the United States circuit court for the district of Washington, southern division.

THE UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, plaintiffs,
vs.
JOHN DOE WINANS AND RICHARD ROE WINANS, partners, doing business under the firm name of Winans Brothers, defendants.

Now on this day come the plaintiffs and present to the court their bill of complaint, together with the affidavits filed in support thereof, and upon reading the said complaint and the said affidavits, and on motion of the said plaintiffs, and the same having been duly considered by the court, and it appearing therefrom that for many years prior to the 9th day of June, 1855, the Yakima Indians were in the possession of and claiming and asserting title to all lands bordering on the Columbia River, on the north bank thereof, where the said river runs along the lands now known and described, according to the Government survey, as township 2 north of range 14 W. of the Willamette meridian, and other lands in Washington Territory, and that at various points along the north shore of the Columbia River in the said township, the plaintiffs, Simpson and White Swann, and the other Indians of the said tribe known as Yakima, and other Indians and tribes of Indians, now known and designated as belonging to the Yakama nation of Indians, were accustomed from time immemorial to fish for salmon and other food fishes in the waters of said Columbia River, where the same flows through and along said township,

23 and that said Indians were also in the habit of and accustomed to build their houses and huts on the lands bordering on the shore of said river in said township, for the use of said Indians during the fishing season and for the purpose of drying and curing the fish which were caught by said Indians, and said Indians were also at said times in the habit of and accustomed to pasture their horses and cattle and other animals upon said lands bordering upon said river during said fishing seasons, and that said Indians were also in the habit of and accustomed to have free and uninterrupted ingress and egress to and from the said river, and the fishing banks and grounds therein, from the adjacent territory, for themselves and their said animals, and that the right, title, and claim of occupancy of said Indians during all said time in and to the said lands, territory, and country was recognized and admitted by the Government of the United States, and that on said 9th day of June, 1855, the Government of the United States, desiring to acquire all of the lands lying north of the said Columbia River in said Territory, in what is now known as said township 2, and other lands adjacent and contiguous thereto, entered into a treaty, contract, and agreement with the said Indians, then in possession of said lands, said Indians now and in said treaty being known and designated by the name of the Yakama nation of Indians, for the cession and transfer of the title and right of possession of said Indians to the United States of all of said lands except such parts thereof as were in said treaty reserved and secured to said Indians for their use and for the purposes mentioned in said treaty, and that in and by the terms of said treaty the said Indians ceded, relinquished, and

conveyed to the United States all of the lands then occupied and claimed by said Indians in said Washington Territory particularly described in said treaty, save and except the lands in said treaty reserved
24 for the use of said Indians for fishing purposes and for their use in connection therewith, bordering on said Columbia River, and other lands in said treaty described, for a permanent reservation for said Indians, and that as a part of the said consideration for said cession, relinquishment, and conveyance of said lands to the United States by the said Indians the said United States guaranteed to the said Indians, and in and by said treaty secured and promised and bound themselves to secure to the said Indians for their use in common with the citizens of said Territory of Washington, the right of taking fish out of the usual and accustomed places along said river, which had been theretofore used by said Indians for said purpose, and also the right to erect temporary buildings for the use of said Indians and for curing the said fish on the lands bordering and adjacent and contiguous to said usual and accustomed fishing places, with the privilege of hunting and gathering roots and berries and pasturing their horses and animals upon any open unclaimed lands in said vicinity, and that said treaty was ratified by the Senate of the United States and by the President of the United States ratified, confirmed, and proclaimed to be in force and operation from the 18th day of April, 1859; and that the said Indians from the date of said treaty, as they had been ac'us'omed to do, prior to the making thereof, continued to fish with their nets and other appliances and caught salmon and other food fishes at said places along the north shore of said Columbia River, in said Columbia River, at divers places between the east line of section 17 and the west line of section 33, in said township 2 N., range 14 E, Willammette meridian, and particularly at divers points along the line of sections 19, 25, and 30 in said township, where the said sections border on the north shore of said Columbia River, contin'ously
25 every season until they were interrupted, interfered with, and prevented by the said defendants as in said bill stated, and that said Indians were also accustomed during all said time to use the lands bordering on said river in said section for a convenient and reasonable distance inland from said river, for the purpose of erecting temporary huts and houses for the curing of the fish caught by them during the said fishing seasons, and for the use and shelter of said Indians during the time they were engaged in catching fish, and they were also during all of said time accustomed to use the lands bordering on the said river in the vicinity of said fishing places for the purpose of pasturing their horses and cattle, and they were also accustomed during all of said time to have free and unmolested access to said fishing places across the lands lying adjacent to said fishing places on said river and to their respective homes, and the said fishing places were at the date of said treaty, and for many years prior thereto had been, the usual and accustomed fishing places of the said Thomas Simpson and White Swan and said other Indians, and said fishing places were in contemplation at the time of the making of said treaty, and are mentioned and secured to said Indians therein.

And that the said defendants have infringed, obstructed, and prevented, and have contrived to obstruct and prevent the said Thomas Simpson and White Swan and said other Indians from fishing and catching and taking fish at said usual and accustomed fishing places on said

river, by force, intimidation, threats, and assults upon said Indians, and have driven the said Indians away from the said fishing places, and have refused and still refuse to allow the said Indians or any of them to come to said fishing places, or catch or take fish therefrom, and have torn
26 down and destroyed the temporary houses erected by said Indians on the lands near said fishing places for drying and curing their said fish, and have refused and still refuse to permit or allow the said Indians to rebuild the said houses or any house on said lands for curing and dying their said fish, and have by threats of bodily harm and by actual assault, force, and intimidation driven the said Indians away from the said fishing places on said river, and refused to allow them or any of them to take fish at said places in common with defendants and other citizens, or at all, and that the said defendants still continue to obstruct and prevent the said Indians from taking fish at said fishing places for any purpose whatever, and that the said defendants have erected and are now maintaining and operating at all the usual and accustomed fishing places of said Indians on said river, in said sections, large fish wheels, and by means thereof have wholly and entirely excluded and prevented said Indians from taking fish at said places, and that said fish wheels are so constructed and operated as to catch all the fish in the usual runways of the fish, and in the usual fishing places of said Indians, and the presence and operation of said fish wheels prevent said Indians from taking fish at all at the usual fishing places of said Indians, and said defendants have excluded and still do exclude said Indians and all of them from said fishing places, and refuse to *to* permit said Indians or any of them to take fish there, in violation of the rights of said Indians under said treaty and contrary to the Constitution and laws of the United States.

Now, therefore, it is hereby ordered, adjudged, and decreed that an injunction be issued pursuant to the prayer of the bill of complaint herein, strictly commanding and enjoining the said defendants, John Doe Winans, a*b*d Richard Roe Winans, and the partnership firm of Winans Brothers, by whatever name or designation they and each of them may be
27 known, their clerks, attorneys, agents, se'vants, employees, and workmen, under the pains and penalties which may fall upon them and each of them in case of disobedience, that they forthwith, and until the further order, judgment, and decree of this court, desist and refrain from in any manner obstrucring, interfering with, or preventing the said plaintiffs, Thomas Simpson and White Swan, and all other Indians, members of the Yakama Nation of Indians, fishing, catching, and taking fish at said usual and accustomed fishing places on the said Columbia River passes along township 2 north, of range 14 east, of the Willammette meridian, and particularly at all points in said river along the line on sections 19, 25, and 30, in said township, where the said sections border on the said river, and that they desist from constructing, operating, or maintaining fish wheels in the waters of said river along said sections in such manner as to prevent and obstruct the said Indians or any of them from fishing or taking fish in said river at said places, and that they desist and refrain from in any manner interfering with the said plaintiffs, and said other Indians erecting and using temporary houses on the lands adjacent to said river at the said fishing places, for a convenient distance inland from the shore of said river, and that they desist and refrain from interfering with or preventing the free access to and egress from said

fishing places on said river of said Indians over and across the lands lying near said river, used as passways for said Indians to and from said fishing places, and that they refrain and desist from interfering with or preventing the pasturing by said Indians of their horses and other animals upon any lands adjacent and contig'ous to said fishing places on said river, which were open and unclaimed at the date of said treaty.

July 11th, 1895.

C. H. HANFORD, *Judge.*

28 No. 122.

In the circuit court of the United States for the district of Washington.

THE UNITED STATES ET AL.
vs.
JOHN DOE WINANS ET AL.

Writ of injunction.

Filed July 24th, 1895. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy.

29 United States of America.

Circuit court of the United States, ninth judicial circuit, district of Washington. In equity.

The President of the United States of America, greeting: To John Doe Winans and Richard Roe Winans, doing business under the firm name and style of Wynans Brothers.

Whereas it has been represented to us in our court of chancery on the part of the United States, Thomas Simpson and White Swan, complainants, that they have lately exhibited their bill of complaint in the circuit court of the United States for the district of Washington, southern division, against you, the said John Doe Winans and Richard Roe Winans, partners doing business under the firm name of Winans Brothers, to be relieved touching the mat'ers therein complained of, in which bill it is stated, among other things, that you have infringed, obstructed, and prevented and have contrived to construct and prevent the said Thomas Simpson and White Swan and other Indians known as the "Yakima Nation of Indians" from fishing and catching and taking fish at lands bordering on the Columbia River, on the north bank thereof, where the said river runs along the lands now known and described, according to the Government survey, as township two (2) north, of range 14 W. of the Willammette meridian, and other lands in Washington Territory, where the "Yakima Nation of Indians" were accustomed from time immemorial to fish for salmon and other food fishes in the waters of said Columbia River, where the same flows through and along said township, and that said Indians were also in the habit of and accustomed to build
30 their houses and huts bordering on the shore of said river in said township, for the use of said Indians during the fishing season, and for the purpose of drying and curing the fish which were caught by said Indians, and said Indians were at said time in the habit of and

accustomed to pasture their horses and cattle and other animals upon said lands bordering upon said river during said fishing seasons,

We, therefore, in consideration thereof and of the matters and things alleged in said bill, strictly commanding and enjoining the said defendants, John Doe Winans and Richard Roe Winans, and the partnership firm of Winans Brothers, by whatever name or designation they and each of them may be known, their clerks, attorneys, agents, servants, employees, and workmen, under the pains and penalties which may fall upon them and each of them in case of disobedience, that they forthwith, and until the further order, judgment, and decree of this court, desist and refrain from in any manner obstructing, interfering with, or preventing the said plaintiffs, Thomas Simpson and White Swan, and all other Indians, members of the Yakima Nation of Indians, fishing, catching, and taking fish at said usual and accustomed fishing places on the said Columbia River passes along township 2 north, of range 14 east, of the Willamette meridian, and particularly at all points in said river along the line on sections 19, 25, and 30 in said township, where the said sections border on the said river, and that they desist from constructing, operating, or maintaining fish wheels in the waters of said river along said sections in such manner as to prevent and obstruct the said Indians, or any of them, from fishing or taking fish in said river at said places, and that they desist and refrain from in any manner interfering with the said plaintiffs and said other Indians erecting and using temporary houses on the lands adjacent to said river at the said fishing places for a con-
31 venient distance inland from the shore of said river, and that they desist and refrain from interfering with or preventing the free access to and egress from said fishing places on said river of said Indians over and across the lands lying near said river, used as passways for said Indians to and from said fishing places, and that they refrain and desist from interfering with or preventing the pasturing, by said Indians, of their horses and other animals upon any lands adjacent and contiguous to said fishing places on said river.

July 11th, 1895.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 11th day of July, in the year of our Lord one thousand eight hundred and ninety-five and of our independence the 120th.

[SEAL U. S. CIRCUIT COURT.] A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS, *Deputy Clerk*.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF WASHINGTON.

I hereby certify that I received the within writ on the 24th day of July, 1895, and on the 27th day of July, 1895, I personally served the same on John Doe Winans and Richard Roe Winans by delivering to and leaving with the said John Doe Winans and Richard Roe Winans at Summit, on the Columbia River, a duly certified copy thereof certified to by R. M. Hopkins, clerk of the U. S. district and circuit court.

JAMES C. DRAKE, *U. S. Marshal*,
By FRANK J. PARKER, *Deputy*.

Dated at Walla Walla this 31st day of July, 1895.

32 No. 122.

In the U. S. circuit court of the district of Wash. for the ninth judicial dist.

UNITED STATES ET AL., PLAINTIFFS,
vs.
WINANS BROTHERS, DEFENDANTS.

Appearance.

Filed Sept. 1st, 1895. A. Reeves Ayres, clerk. By W. H. Kirkman, deputy.

Carey, Idleman, Mays & Webster, attorneys for defts.

33 In the circuit court of the United States, ninth judicial district, district of Washington.

UNITED STATES ET AL., PLAINTIFFS,
vs.
LIMAEN WINANS AND AUDUBN WINANS, partners, as Winans Brothers, defendants.

The above-named defendants, Limaen Winans and Audubn Winans, partners, doing business under the firm name and style of Winans Brothers, hereby enter their appearance in the above-entitled cause.

CAREY, IDLEMAN, MAYS & WEBSTER,
Solicitors for Defendants.

34 No. 122.

In the U. S. circuit court.

UNITED STATES ET AL., PLAINTIFF,
vs.
JNO. DOE WINANS ET AL., DEFENDANT.

Demurrer.

Filed Oct. 7th, 1895. A. Reeves Ayres, clerk. By W. H. Kirkman, deputy.

35 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and WHITE SWAN, complainants.
vs.
LIMAEN WINANS AND AUDUBN WINANS, partners, doing business under the firm name of Winans Brothers, defendants.

To the judge of the circuit court of the United States for the district of Washington:

The joint and several demurrer of Limaen Winans and Audubn Winans to the bill of complaint of the United States of America, Thomas Simpson, and White Swan, the above-named complainants.

These defendants by protestation, not confessing all or any of the matters and things in the complainants' bill of complaint to be true, and in such manner and form as the same is therein set forth and alleged, do demur to said bill, and for cause of demurrer showeth:

First. That the complainants have not in and by said bill made or stated such a case as entitle them, or any of them, in a court of equity to any relief against the defendants, or either of them, as to the matters contained in the said bill of complaint, or any of such matters.

Second. That this court has no jurisdiction of the subject-matter of the suit in said bill set forth, nor of the persons of the defendants, or of either of them.

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, these defendants do demur thereto, and humbly demand judgment of this court whether they shall be compelled to make any
36 other or further answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HUNTINGTON & WHITSON and
CAREY, IDLEMAN, MAYS & WEBSTER,
Solicitors for Defendants above named.

I, F. P. Mays, do hereby certify that I am one of the counsel for the defendants named in the foregoing demurrer; that I have examined the same, and that in my opinion it is well founded in point of law.

F. P. MAYS,
Of Counsel for Demurrants.

DISTRICT OF OREGON, *ss.*

I, Limaen Winans, being first duly sworn, depose and say: That I am one of the defendants joined in the foregoing demurrer; that said demurrer is not interposed for the purpose of delay, but only that justice may be done.

LINNAEUS WINANS.

Subscribed and sworn to before me this 5th day of October, 1895.

[NOTARIAL SEAL.] B. S. HUNTINGTON,
Notary Public for Oregon, residing at The Dalles, Oregon.

37 No. 122.

In the U. S. circuit court of the dist. of Washn., southern division.

UNITED STATES ET AL., PLAINTIFF,
vs.
WINANS BROS., DEFENDANT.

Stipulation.

Filed November 19th, 1895. A. Reeves Ayres, clerk. By W. H. Kirkman, deputy.

38 In the circuit court of the United States, ninth judicial district, district of Washington.

UNITED STATES ET AL., PLAINTIFFS,
vs.
LIMAEN WINANS AND AUDUBN WINANS, PARTNERS as Winans Brothers, defendants.

Whereas the above plaintiffs have filed their bill of complaint against the above defendants, praying for certain relief therein fully set out, and have secured an order in said cause restraining the defendants from the commission of certain acts in said order set out (said bill of complaint and said order are hereby made a part hereof and referred to for matters stated therein);

And whereas owing to the time of year it is not convenient to have any immediate hearing upon the questions involved, but it is desired by the parties hereto that neither shall be debarred from taking fish from the Columbia River at the places described;

And whereas it is agreed and understood between the said parties that no act or admission herein made shall affect the right of either party to claim his full rights in the trial of said cause, and that no statements herein by either party shall in any way affect his rights hereafter to assert his full claim, except that the execution of this stipulation shall be an appearance for all purposes.

Now, therefore, in consideration of the premises, and to meet the purposes aforesaid, and for no other purpose, it is hereby agreed that until further order of this court the said plaintiffs, Thomas Simpson and White Swan, and all other Indians known as the Yakima Indians, shall have the right, in common with the defendants, of taking fish at all usual and customary places, and particularly at all points in said river along
39 the line of sections 19, 25, and 30, in township two north of range 14 east of the Willamette meridian. And all said Indians shall have the right until the said further order of free egress and ingress to and from said places of fishing over and across the lands lying near said river and used as pass ways for said Indians to and from said fishing places, and to use the lands bordering on said fishing places upon which to erect temporary houses for drying and curing fish and for shelter for the Indians and families, and the adjacent vacant and open lands for pasturing their horses.

It is further agreed that the observance of the above stipulation by the defendants shall in no way subject them to contempt proceedings under said restraining order.

WM. H. BRINKER,
United States Attorney.
F. P. MAYS,
Solicitor for Defendants.

40 THE U. S. ET AL.
vs.
JOHN DOE WINANS ET AL. } No. 122.

Order.

Filed Nov. 19, 1895. A. Reeves Ayres, clerk. By W. H. Kirkman, deputy.

41 In the United States circuit court for the district of Washington, southern division.

UNITED STATES ET AL.
vs.
LIMAEN WINANS ET AL., SUED HEREIN AS John Doe Winans et al.

Now come the parties by their respective counsel and file their stipulation in writing to the effect that the injunction heretofore issued herein be continued in force, with the modification that all of the Indians of the Yakima tribe or nation of Indians shall have the right in common with the defendants of taking fish at all usual and customary places, and particularly at all points on the Columbia River, described in the bill of complaint and in said stipulation. And further, that all of said Indians shall have free ingress and egress to and from said fishing places over the lands bordering on said river, along the usual roads, trails, and passageways, and also to use the lands bordering on said fishing places upon which to erect temporary houses for drying and curing fish and for the shelter of said Indians and their families during the fishing season, and to use any adjacent open and vacant land for pasturing their horses.

Which said stipulation having been seen and examined by the court, it is ordered that said injunction be modified as above recited, and it is further ordered that said injunction as so modified be and the same is continued in full force and effect until the further order of this court.

C. H. HANFORD, *Judge.*

Nov. 19, 1895.

42 No. 122.

In the circuit court of the United States for the district of Washington.

UNITED STATES OF AMERICA ET AL.
vs.
LIMEAN WINANS ET AL.

Opinion.

Filed Mch. 31, 1896. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

43 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and WHITE SWAN, complainants,
vs.
LIMEAN WINANS AND AUDUBN WINANS, partners doing business under the firm name of Winans Brothers, defendants.

Opinion. Filed March 31, 1896.

In equity. Suit by the United States, together with certain Indian plaintiffs, for an injunction to restrain the defendants from interfering with fishery rights guaranteed to the Indians of the Yakima Nation by the terms of the treaty made and concluded between the United States and said Indians. Demurrer to the bill of complaint. Overruled.

WM. H. BRINKER,
U. S. Attorney, for Plaintiffs.
F. P. MAYS,
For Defendants.

Hanford, district judge:

The bill of complaint in this case claims for the Yakima Indians an unlimited right to take fish from the Columbia River at a certain specified place, and a right of ingress and egress to and from said place, and a right to erect temporary buildings for curing fish and for the habitations of said Indians during each fishing season to the same extent as if such rights were especially granted and conferred by a patent from the proprietor and sovereign of the country. The basis for the claims
44 is to be found in the reservations contained in the treaty between the United States and the Indians of the Yakima Nation, whereby the said Indians ceded to the United States the Indian title to certain lands.

The provisions of the treaty material to be considered are as follows:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. * * *

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians the tract of land included within the following boundaries: * * *

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time and not included in the reservation above named. * * *

"Article III. And provided that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. * * *

"Article X. And provided, that there is also reserved and set apart from the land ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fisheries," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." (12 U. S. Stat., 951.)

It is plain that the treaty, whether considered as a grant from
45 the United States Government to the Indians or as a reservation by the Indians, secures to the Indians rights of two kinds, viz, exclusive rights, and rights to be enjoyed in common with citizens. The rights of fishery within the tracts set apart for the Indians, and in streams bordering the same, are exclusive in favor of the Indians, while the right to take fish at usual and accustomed places outside of reservations is to be enjoyed in common with citizens of the Territory. This common right of fishery at usual and accustomed places is coupled with the right of erecting temporary buildings for curing fish, and of hunting, gathering roots and berries, and pasturing horses and cattle upon open

and unclaimed land. It would not be a fair construction of the treaty to hold that any particular ground, in addition to the reservations to be set apart and surveyed for the exclusive use of the Indians, should be held permanently as places for temporary buildings or for the pasturage of horses and cattle. The theory that lands conveyed by Government patents, after being so conveyed and appropriated by individual citizens, still remain subservient to use and occupation by the Indians for travel over the same otherwise than by lawfully established public highways and for camping grounds, finds no support in the provisions of the treaty nor in the rules for the construction and interpretation of statutes which must be applied in the interpretation of the treaty and of the public-land laws of the United States. On the contrary, the enumeration of other rights secured to the Indians by express words negatives any possible presumption of rights by mere implication. For the rule is, "Expressio unius est exclusio alterius." The language of the treaty indicates that the purpose was to secure to the Indians equality of rights with citizens in the matter of fishing, hunting, gathering roots and berries, and pasturing horses and cattle, and in the use and occupation of unclaimed land for the erection of temporary buildings during each fishing season. The United
46 States attorney has argued that the patenting of the banks of the Columbia River should not be made effective as a means of depriving the Indians entirely of all benefits secured to them by the treaty, in the matter of places for temporary houses, for without some place to build upon their common right of fishery will be itself destroyed. This might be a good argument against issuing patents, but insofar as it bears upon the questions in this case it may be well answered by saying that the executive branch of the Government had ample power to provide for the Indians by reserving from sale and settle as much ground as the Indians require for their use, and if the President has failed to exercise his power, and if it is now too late for him to protect the Indians in their treaty rights, they may purchase and own the ground necessary for their use, as citizens who have a common right of fishery with them may do.

The bill of complaint charges the defendants with having violated the rights of the Indians in the following particulars: By forcibly preventing the Indians from fishing in the Columbia River in front of certain specified land in the possession of the defendants, and to which they claim to have acquired the title from the Government of the United States, the place indicated having been at the time of the making of said treaty, and long prior thereto, one to which the Indians were accustomed to resort during the fishing season of each year, for the purpose of taking fish and curing the same, to supply themselves with food; by placing fish wheels so as to take all the fish coming in front of said land, and thereby excluding the Indians from enjoying their common right of taking fish at said place; and by destroying the buildings erected by the Indians for curing fish, and by force preventing the Indians from rebuilding.

It is plainly an invasion of the rights of the Indians under the treaty, to exclude them from fishing in the Columbia River at the place
47 indicated, and the Government has the right to employ the power of this court to make the treaty effective. But the right of the

Indians to erect temporary buildings on any particular spot of ground, according to the terms of the treaty, as I construe it, ceased when the title to that land was transferred from the Government and became vested as private property. The demurrer must be overruled, for the bill states facts sufficient to require the court to enjoin the defendants from interfering with the Indians in the enjoyment of their common right of fishery, although in my opinion the court will not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing.

The defendants, upon the authority of the cases of the United States vs. Huffmaster, 35 Fed. Rep., 81–83, contend that this court is without jurisdiction, for the reason that the amount in controversy does not exceed $2,000.00. The Huffmaster cases, however, have been overruled by the Supreme Court, in a decision rendered December 23, 1895, in the case of the United States vs. Wm. P. Sayward and George A. Meigs.

The United States has the right to maintain the suit as guardian and trustee of the Indians to protect their rights secured by the treaty.

United States vs. Boyd, 68 Fed. Rep., 577.

United States vs. Flournoy Co., 69 Fed. Rep., 886.

United States vs. Holliday, 3 Wall, 407.

United States vs. Kagama, 118 U. S., 375.

The defendants voluntarily entered a general appearance in this case, without reserving any right to object to the jurisdiction of the court by reason of being inhabitants of the State of Oregon, their demurrer, filed more than a month afterwards, goes to the merits of the controversy, and it does not specifically make the objection that the suit was
48 not brought in the proper district. I consider the suit to be local in its nature—that is to say, a suit to enforce a claim to property situated within this district, and therefore, this court is authorized to assume jurisdiction by virtue of the 8th section of the act of March 3rd, 1875, 1 Supp. R. S., 2nd. Ed., 84–85

Hatch vs. Ferguson, 57 Fed. Rep., 966.

S. C., 68 Fed. Rep., 43.

Greeley vs. Lowe, 155 U. S., 58–76.

But if this were not so, the defendants having waived their personal privilege of exemption from being sued in this district by having appeared and pleaded to the merits they can not be heard to urge the objection now.

Texas and Pacific Railway Co. vs. Cox, 145 U. S., 593–808.

The subject matter of the action is within the jurisdiction of the court, and the defendants are in court for all purposes of the litigation.

Demurrer overruled.

C. H. HANFORD, *Judge.*

49 No. 122.

In the circuit court of the U. S. of the district of Washington.

UNITED STATES ET AL., PLAINTIFFS,
vs.
WINANS BROS., DENFENDANTS.

Answer.

Filed May 19th, 1896. A. Reeves Ayres, clerk. By W. H. Kirkman, deputy.

Carey & Mays, attorneys for defendants.

50 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, plaintiffs,
vs.
AUDUBON WINANS AND LINNAENS WINANS, partners doing business under the firm name of Winans Bros., defendants.

To the judges of the circuit court of the United States for the district of Washington:

The joint and several answer of Audubon Winans, in the bill by mistake called John Doe Winans, and of Linnaens Winans, in the bill called Richard Roe Winans, defendants, to the bill of complaint of the above-named plaintiffs.

These defendants, respectively, now, and at all times hereafter, saving to themselves all and all manner of benefit of advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering, say:

I.

These defendants say they have no knowledge or information sufficient to form a belief as to whether or not plaintiffs White Swan and Thomas Simpson, or either of them, were born in the United States or are members of the Yakama tribe or nation of Indians.

II.

These defendants admit generally the allegations contained in paragraph II of said bill, except that they say that said Yakima and other Indians mentioned in the treaty hereinafter referred to were
51 at and prior to June 9, 1855, only claiming and asserting the title to the lands referred to in said treaty as Indian country, and that such claim was made not only to the lands which upon the extension of

Government surveys became designated as township 2 north, range 14 east, of the Willamette meridian, but also they were so claiming the Indian title to all the lands mentioned in said treaty, and said Yakima Nation of Indians had been and were accustomed yearly to fish for salmon and other food fishes in the various waters included within the said boundaries, but said fishing was not confined to said township 2 north, or to any particular place, but was done at the various fisheries within the territory referred to and at various places on said Columbia River, along the whole northern boundary of said territory, and at different portions of the year at different localities, accordingly as the waters of said river were rising or falling; and these defendants further say that during the said time the said rights referred to in paragraph II of the bill were not rights or acts peculiar to the said township 2 north, range 14 east, but were rights which were common to all the fishing places, of which there were a great number, within the said treaty boundaries; and that the United States only recognized in the said Yakima Nation the possession, title, and right of possession to said territory which was incident to lands known and designated as Indian country.

III.

These defendants answering paragraph III, allege that it was not the purpose of the United States by said treaty to acquire only the lands lying in the township referred to and other lands adjacent and contiguous thereto, but that the true purpose and expressed intent thereof was to acquire the Indian title to all the said lands within the boundaries mentioned in said treaty, all which was then so in the possession and occupied by said Yakima Nation the same as was said township 2 north, range 14 east.

52 And they deny that by said treaty any lands were conveyed to the United States or that thereby any lands which bordered on said Columbia River were reserved for the use of said Indians, or any of them, for fishing purposes; and they say that said treaty did not secure to the said Indians, or any of them, the right of taking fish at all or any usual and accustomed places along said river which had been theretofore used by them for that purpose or otherwise, but simply secured to them the right "of taking fish at all usual and accustomed places in common with the citizens of said territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land * * * " and that such rights did not refer to the particular township or locality indicated in the said bill, but to all townships and to all localities where such rights might be lawfully exercised under the terms of said treaty.

IV.

These defendants admit the whole of paragraph IV of said bill.

V.

The defendants say that they have no knowledge or information sufficient to form a belief as to whether or not from the date of said treaty the said Indians fished with nets or other primitive appliances, as they

had been accustomed to do, or otherwise, or as to whether or not they had previously so fished between the east line of section 17 and west line of section 33, or elsewhere in said township, or at divers or any points along the line of sections 19, 25, or 30 in said township, where the said sections, or any of them, bordered on the north shore of said Columbia River, or elsewhere, continuously every season, or at all; and they deny that said Indians, or any of them, did so fish until they were interrupted, interfered with, or prevented by the defendants, or either of them, as in the bill alleged, or otherwise; and they deny that the said Indians, or any of them, ever at any time did fish on any part of section 25
53 in said township, and they aver whatever, if any, fishing the said Indians, or any of them, did at any time after said treaty was generally at the numerous fisheries within the confines of the boundaries described in said treaty, and that whatever uses of any kind, if any, were made of the said lands, or any of them, bordering on the said river were made prior to the time when the said lands were patented by the United States, as hereinafter mentioned; and they aver that ever after said lands were so patented the said Indians have been interrupted, interfered with, and prevented by the said owners of said lands from exercising all and every right and privilege thereon which was inconsistent with the individual ownership of the soil, except such rights and privileges as the said individual owners saw fit to grant them, and suffer them to receive.

And they deny that said fishing places or any of them along the north shore of said river, where the said sections border thereon, were at the date of said treaty, or for many years, or any time prior thereto had been the usual or accustomed fishing places of the said Thomas Simpson and White Swan, or either of them and said other Indians, or any of them; and deny that said fishing places, or any of them, were in contemplation at the time of making said treaty, and deny that they, or any of them, are mentioned or secured to said Indians, or any of them, by the said treaty; but aver that all the fishing places within the lands described in said treaty were contemplated in its making, and were mentioned and secured to said Indians only in the manner and upon the terms and conditions therein set forth.

VI.

Answering paragraph VI these defendants say they have no knowledge or information sufficient to form a belief as to whether or not Thomas Simpson or White Swan, or either of them, or all or any of the Indians of the said Yakima Nation have ever, since the said treaty, sold, assigned, or transferred their, or any of their alleged right to the said fishing places, or any part thereof.

54

VII.

Answering paragraph VII, these defendants say they have no knowledge or information sufficient to form a belief as to whether or not the said Yakima Nation, or any of them, are under the charge of the Indian agent or superintendent of the United States, or as to whether or not they, or any of them, receive support, education, or protection from the

said United States, or as to whether or not they or any of them sustain the relation of wards to the United States, or as to whether or not the said United States are exercising the rights, duties, or authority of guardian to any of said Indians.

VIII.

Answering paragraph VIII, these defendants admit the truth thereof.

IX.

Answering paragraph IX, these defendants admit the truth thereof.

X.

Answering paragraph X, these defendants deny that they, or either of them, have contrived how to prevent the said plaintiffs, Thomas Simpson and White Swan, or either of them, or any of said Yakima Nation from fishing or catching or taking fish at said alleged usual and accustomed fishing places on said river at the points alleged in the bill, or any of them, or elsewhere; and deny that they, or either of them, by force, intimidation, or threats, or by assaulting the said Indians, or any of them, have driven the said Indians, or any of them, away from the said fishing places, or any places; and deny that they have refused or still refuse to allow the said Indians, or any of them, to come to said fishing places, or any of them to catch or take fish in any way, or manner, or that they have refused or still refuse the said Indians in any way or manner from taking fish in the said river where any of them may choose in common with white citizens of the State of Washington except to refuse to permit them, or any of them, to exercise all or any of their alleged treaty rights upon the patented lands in the possession and control of these defendants and which border and abut upon the said Columbia River at the said places, and each of them, as these
55 defendants believed, and do each still believe, they had the right to do under said treaty; and they deny that they, or either of them, have torn down or destroyed the temporary or other houses erected by said Indians, or any of them, on the lands near said alleged fishing places, or elsewhere, for drying or curing their said fish; and they deny that they, or either of them, ever refused, or still refuses to permit or allow the said Indians to rebuild the said houses, or any houses whatever, on lands for curing and drying of said fish, or for all or any such purposes, except to refuse to permit them to build said or any houses upon lands long since patented by the United States and now in the control and possession of these defendants; and they deny that they, or either of them, have by threats of bodily, or any harm, or by actual or any assault, or by force or intimidation, or otherwise, driven the said Indians, or any of them, away from said or any fishing places on said river, or refused to allow them, or any of them, to take fish at said or any places in common with the defendants and other citizens, or otherwise; on the contrary, these defendants aver that they and their predecessors, have at all times, and still do place no obstructions of any kind against said Indians fishing in said river wheresoever they may choose in common with white citizens of the Territory, and have at all times been and still

are willing that they should so fish, provided they can so fish without trespassing upon the land of these defendants; and deny that they, or either of them, continue to prevent the said Indians, or any of them, from taking fish at such places, or any of them, for any purposes whatever, or that they, or either of them, prevent said persons from fishing at all; on the contrary they aver they have at all times been and now are willing to give to the said Indians all the rights which under the said treaty and the rights of these defendants the said Indians are entitled to exercise, and that the defendants, or either of them, have not in any way prevented them and each of them from exercising such rights.

56 XI.

Answering paragraph XI, these defendants say it is not true that said Indians, or any of them, were accustomed to take fish with dip nets or other similar appliances at certain places along the shore of said river where said nets and appliances could be advantageously used until they were molested and interfered with by the defendants, but they say that the taking of fish by the said Indians in whatsoever manner they were taken was interfered with long prior to any action by these defendants, or either of them, and very soon after the patenting of the said lands by the United States. They deny that owing to the peculiar or other formation of the shore line or the rocks thereof, the waters of said river were or are thrown in certain or any channels or eddies, in which the said Indians, or any of them, could or did use their nets or appliances effectively for taking fish, and deny that the defendants, or either of them, in disregard of the alleged, or any, rights of the said Indians, or any of them, or in defiance of the terms of the said treaty, or in defiance of any of the terms of said treaty, have erected or are now maintaining or operating at all or any of the usual or accustomed fishing places of said Indians, or any of them, on said river, in said, or any, sections above mentioned, large, or any, fish wheels, and by means whereof have wholly or entirely, or at all, excluded or prevented the said, or any, Indians from fishing or taking fish at said places, or any of them.

And they deny that said, or any fish wheels, are so constructed or operated as to catch all, or any considerable portion, of the fish in the usual or other runways of fish, or to catch all, or any considerable portion, of the fish in the usual or other fishing places of said Indians, or any of them, and deny that the presence or operations of said, or any, fish wheels prevent the said Indians, or any of them, from taking fish at all, or from freely or successfully fishing at the said alleged usual and accustomed fishing places, and each of them; and they deny that the defendants,
57 or either of them, have excluded, or still do exclude, the said Indians, or any of them, from their said alleged usual and accustomed fishing places, or any of them; and deny that they or either of them, refuse to allow or permit the said Indians, or any of them, to catch or take fish at said places, or any of them, except that they claim and insist that said Indians have no right to go upon patented land in the possession and under the control of these defendants, where the citizens of the State of Washington are not entitled or permitted to go to take fish from said river, and that except in refusing the said Indians to trespass upon the said patented lands they have never refused and do not now refuse

to allow or permit said Indians, and have never in any way either in one or any of the manners alleged in the bill, or otherwise, prevented, obstructed, or in any way hindered, excluded or delayed the said Indians, or any of them, from exercising their rights of fishery in the said river freely and fully; and they aver that said fish wheels are erected upon patented land in their possession and under their control and at places where their erection and operation do not in any way interfere with the right of said Indians to fish in said river in common with citizens of the State of Washington, and they have not and do not now in any way prevent the said Indians from so fishing.

XII.

Answering paragraph XII, these defendants say, it is not true that they, or either of them, prevented said Indians, or any of them, from taking fish at said fishing places, or any of them; and they deny that they, or either of them, have refused, or in any way prevented the said Indians, or any of them, from erecting houses for curing their fish on any lands not patented and not in the possession and control of these defendants; and deny that they, or either of them, have prevented or obstructed the said Indians from crossing any lands going to or returning from said alleged fishing places, which was not patented land, and as such in the control and possession of these defendants.

58 They deny that to color such refusal they gave out or pretended that they have acquired from the Government of the United States by patent, or otherwise, the exclusive right and title to the lands bordering on said river at said fishing places, and the right to exclude the said Indians therefrom, but of the contrary they aver that all the said lands to which they have refused the Indians access, and upon which they have refused the said Indians the right to enter, is in fact land patented by the United States, and the absolute title thereto thereby long since passed from the Government, and they deny that their rights in the lands bordering on said river, or any of them, are subject or subordinate to the rights of said Indians, or any of them, to use said lands, or any of them, for the purpose of erecting temporary houses for drying and curing the fish, or to the right of said Indians, or any of them, to pass over any of said lands peaceably, or otherwise, to or from said fishing places, or any of them; and deny that said lands are subject to any rights of any of said Indians, either by the terms of said treaty or otherwise; on the contrary they aver that many years ago the United States conveyed by its patents in the usual form all the said lands bordering and abutting upon the said river and mentioned in the complaint, to various persons under the homestead and other acts of Congress, and did so without mentioning any rights or reservations in favor of or for the benefit of said Indians or any of them; and the said grantees of the United States took the same entirely freed from the alleged rights which the said plaintiffs and said Indians now claim to exercise upon the said lands; that section 25 referred to in the bill was evidently a mistake, and the defendants believe that section 25 in township 2, north range 13 east was intended to be referred to, which land was also patented many years ago by the United States in the same way and manner as the other land, and said other land and the lands bordering and abutting upon said river in section 25 are now held

by mesne conveyances from the original grantees of the United
59 States, and these defendants now have the lawful and peaceable possession and control of each of them, and all the alleged acts and doings complained of grew out of the refusal of these defendants to permit the Indians to trespass upon the said lands in connection with taking fish; that the said lands so under the possession and control of these defendants border and abut upon the said Columbia River through the entire distance, over one mile, where the plaintiffs pretend and allege they are prevented and obstructed from and denied the right to fish, when in truth the said Indians can not possibly fish in the said river without going over and trespassing on the said patented lands; and owing to the fact that the Columbia River along the said lands is tortuous, swift, and exceedingly rapid, the said Indians, or any one else, can not possibly fish within the said stream without trespassing upon said patented lands; and the fish wheels, of which these defendants have but three erected on said lands, are located upon the said patented lands and do not and can not in any way interfere with any rights which the said Indians can properly or lawfully exercise; that along said river for said distance of over one mile said Indians, until the said lands were owned by grantees of the United States, could and did successfully take fish at many hundreds of places, and could yet do so but for the right of these defendants to prevent said Indians from trespassing upon the said patented land; in fact, said Indians have so fished from the shore, and could yet do so at any place along the said river, except for said private ownership.

XIII.

These defendants, further answering, say that the season for taking fish is confined almost entirely to the time of the spring rise of the Columbia, and that the river as it rises extends daily over a larger scope of the abutting lands, and thereby the so-called fishing places change almost daily, hence there are not now, never was, and can not be any regular and definite fishing places.

That at various points for many miles above the lands described
60 in the bill, and for several miles below, besides at various other places along said river, there are fishing places which were used and occupied as such before, at the time of, and since the making of, said treaty, and as to many of them the title to the adjoining and abutting land is still in the United States.

XIV.

That early in 1893 these defendants went into the possession and control of said lands under a bond for a deed therefor from the holders of title thereof from the Government's patentees, and they have ever since and now do hold the said land as theirs, and ever since have and now do have the exclusive right to the possession and control thereof.

That the said land so held by them was a part of a larger tract held and owned by grantees of patentees of the United States, and long prior to the commencement of this suit, and for the purpose of protecting the said lands for pasturage and inclosing their houses and preserving their

vegetables and fruit trees which were and are growing thereon, these defendants constructed a fence on their said land on the side farthest from the river, which fence still remains, and with the said river completely encloses the said lands. That notwitstanding the exclusive rights which these defendants had in said lands, the said Indians have from time to time and repeatedly trespassed upon the said lands to the great injury of these defendants, and still continue so to do; and further, notwithstanding these defendants had the legal right to exclude the said Indians therefrom and prevent the said repeated trespasses they have many times, and prior to the commencement of said suit, and continuously since the restraining order herein, allowed them to trespass upon the said lands in the alleged exercise of the alleged rights claimed by plaintiffs under the said treaty.

That no such privileges have been exercised by or granted to the citizens of the State of Washington.

XV.

61 Further answering, these defendants say that they had granted to said Indians the privileges mentioned in the last paragraph with the hope that they would ultimately desist therefrom, but that on the contrary when they were not allowed to so trespass upon the said land without let or hindrance from these defendants, or either of them, this suit was brought, and the plaintiffs on account of the conduct of these defendants in so refusing to permit said repeated trespasses, and for no other truthful reason, unjustly and unequitably complained and caused these defendants to be subpœnaed to suffer this expensive litigation in addition to the great damage and wrong already suffered by said wrongful trespasses.

And these defendants deny all and all manner of unlawful combinations and confederacy wherewith they, or either of them, are by the said bill charged without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for these defendants, or either of them, to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants, and each of them; all which matters and things these defendants, and each of them, are ready and willing to aver, maintain, and prove as this honorable court shall direct; and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained; and further pray that upon the final hearing the said Yakima Nation, and each of them, be restrained and enjoined from further trespassing upon said patented lands so in the possession and control of the defendants, and each of them; and for such other and further relief as to equity and good conscience doth pertain.

AUDUBON WINANS,
LINNAEUS WINANS,
Defendants.

HUNTINGTON & WILSON,
F. P. MAYS,
Solicitors for defendants.

62 No. 122.

In the circuit court of the United States for the district of Washington.

UNITED STATES ET AL.
vs.
WINANS BROTHERS.

Replication.

Filed June 10th, 1896. A. Reeves Ayres, by W. H. Kirkman.

63 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, & White Swan, plaintiffs,
vs.
AUDUBON WINANS AND LINNAENS WINANS, DOING business under the firm name of Winans Brothers, defendants.

To the honorable judges of the United States circuit court, for the district of Washington.

The replication of the United States of America, Thomas Simpson, and White Swan, plaintiffs, to the answer of Audubon Winans and Linnaens Winans, doing business under the firm name of Winans Brothers, defendants.

These repliants saving and reserving unto themselves all manner and advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereto, saith: That they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto.

And that said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants;

Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, or avoided, traversed or denied, is true;

Of which matters and things these repliants are, and will be ready, to aver and prove as this honorable court shall direct;

And humbly pray as in and by their said bill they have already prayed.

WM. H. BRINKER,
United States Attorney.

32005—04——3

No. 122.

In the circuit court of the United States for the district of Washington.

UNITED STATES ET AL.
vs.
LINNEAS WINANS ET AL.

Opinion.

Filed July 21, 1896. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

65 In the circuit court of the United States, district of Washington, southern division.

UNITED STATES, THOMAS SIMPSON, AND White Swan, plaintiffs,
vs.
LINNEAS WINANS AND AUDUBON WINANS, partners as Winans Bros., defendants.

Whereas, at the instance of the above plaintiffs upon filing of their bill of complaint herein, an order was issued on the 11th day of July, 1895, out of the above court, restraining the defendants from the commission of certain acts therein set forth; and

Whereas said court has since that time, in a decision upon the demurrer of defendants filed to said bill, construed the rights of said plaintiffs under said treaty to be less than claimed by the said plaintiffs; and

Whereas, upon a motion to modify said restraining order, heard by consent of the parties thereto, at Tacoma, Washington, on the 7th day of July, 1896, upon which hearing the judge of said court decided that the said former restraining order should be modified so as to conform to the opinion of said court upon said demurrer:

Now, therefore, in consideration of the premises, it is ordered that all orders heretofore made in said cause, restraining the defendants, be, and they hereby are, modified to conform to this order, and the defendants and each of them, and the firm of Winans Bros., and their clerks, attorneys, agents, servants, employees, and workmen, and all persons acting under them, or any of them, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, are
66 strictly hereby commanded and enjoined that they forthwith and until the further order, judgment, and decree of this court, desist and refrain from in any manner obstructing, interfering with, or preventing the said plaintiffs, and all others of the Yakima Nation of Indians from fishing, catching, or taking fish in the Columbia River, at all usual and accustomed fishing places, where said river passes through township 2 north, range 14 east, and township 2 north, of range 13 east, and particularly at all points on said river along the lines of sections 19, 25, and 30 in said first-named township, and along section 25 in said second-named township, where the said sections border on the said river; and that they desist from constructing, operating, or maintaining fish wheels

in the water of said river along said sections in such manner as to prevent and obstruct the said Indians, or any of them, from fishing or taking fish in said river at said places, or any of them; and that they and each of them desist and refrain from in any manner interfering with the temporary houses, if any, which were on the lands adjacent to said river at said fishing places, and each of them, when this suit was begun; and desist and refrain from obstructing any road or highway used by said Indians as a means of ingress and egress to and from the Columbia River, at the date of the commencement of this suit.

Dated this 21st day of July, 1896.

C. H. HANFORD, *Judge.*

67 THE UNITED STATES
vs.
LINNEAS WINANS & AUDUBON WINANS. } No. 122.

Opinion of the court.

Recorded, Rule Book, Equity, page 101.

Filed Sept'r 14, 1896. A. Reeves Ayers, clerk, by Chas. B. Johnston, deputy.

68 In the United States circuit court, district of Washington, eastern division.

THE UNITED STATES ET AL., PLAINTIFFS,
vs.
LINNEAS WINANS AND AUDUBON WINANS, DEFENDANTS. } 122.

Decision of Judge Hanford rendered September 10, 1896.

In the case of the United States and certain Indians against A. Winans, the application of the United States attorney for a warrant against the defendants and one A. Winans, for contempt of court in violating the modified injunction in this case, I have reached the conclusion that the showing is not sufficient to justify a warrant.

The contempt of court is alleged to consist in building a fence obstructing certain roads and passageways necessary to enable the Indians to go to the river for the purpose of fishing. The order of the court granting the injunction prohibited the defendants from closing up any existing highways or roads that were in use, at the time the suit was commenced by the Indians for the purpose of ingress and egress to and from their fishing places on the river.

That order was not intended to be limited so as to apply only to legally existing roads and highways open to the public, and on the other hand it was not intended to prevent the owners of land from enclosing their premises. It was not intended that all the wide space of country that was open and might be crossed should remain in that condition, so as to enable the Indians to go at their will where they pleased across any piece of land, but it was intended to apply to existing roads that were actually used as roads by the Indians for the purpose of going to the river to
69 fish, and roads that were existing and in use were intended to be kept open by the order, whether they were legally constituted highways,

such as the public had a right to complain in case of any obstruction, or whether they were simply roads that the Indians used especially; but the order was limited in its terms to roads or highways.

Now that is the provision in the injunction order which was claimed to have been violated, and that is the construction I give to that order.

The showing made on behalf of the plaintiffs is not specific as to any particular road that has been obstructed, for it conveys the idea that there are a number of paths, byways, and passageways across the defendants' land which the Indians for their convenience have been in the habit of using; and it said that these roads had been obstructed by a fence built by the defendants; that the Indians are thereby prevented from going to the river.

This state of facts is shown only by the affidavit of one Indian. Without specifically designating any particular road, his affidavit alleges, in general and sweeping terms, that all the trails and passageways that the Indians are accustomed to use across the defendants' lands have been obstructed by the fence.

Now that showing is met by affidavits of a number of persons, including reputable citizens who are disinterested in the case, and including persons in the employ of the defendants who are well informed. They show that the fence does not cross or obstruct any road whatever that connects the highway from Goldendale to The Dalles, with the river, or any road that is known as a road. These affidavits show the condition of the country there; that there are a number of winding paths, beaten by stock traveling, and they go here and there—pretty much everywhere where the country is left open; that the Indians had not, previous to the commencement of this suit or at the time the suit was commenced, any defined roads crossing defendants' land, and no road or path whatever, except these stock trails is crossed or obstructed by the fence.

These affidavits also show that the only well-known and used road which the Indians have been accustomed to use in going to their fisheries is a road or trail known as the "Colwash trail." That road is not obstructed by the fence and the Indians are not prevented from going to the river.

I can only judge of the situation by the testimony, and there is a decided preponderence of the evidence on the side of the defendants. I therefore think it will be useless and uselessly expensive to issue a warrant to bring on a case here for trial that will be attended with a good deal of inconvenience to the parties, and great expense to the Government as well as to the defendants. As I view the situation from the showing that is made, there is nothing in this application except the well-known opposition of the Indian tribes to having the country fenced up. By the terms of their treaty with the Government and the action of the Government in conveying title to the land, those who have acquired title have a right to fence up their lands, and this objection of the Indians can not prevail against it.

C. H. HANFORD, *Judge.*

71 UNITED STATES
vs.
LINEAN WINANS AND AUDUBON WINANS, doing business as Winans Brothers. } No. 122.

Order of reference.

Now, on this 12th day of November, 1896, upon motion of the United States attorney, it is ordered that this cause be, and the same hereby is, referred to S. C. Henton, esquire, of North Yakima, as special examiner, to take and report the testimony in this cause.

November 12, 1896.

C. H. HANFORD, *Judge.*

(Copy of order entered on page 110, Rule Book Equity, in the office of the clerk of the United States circuit court for the district of Washington, southern division, at Walla Walla, Washington.)

72 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES, THOMAS SIMPSON, AND WHITE SWAN, plaintiffs,
vs.
LINNEAS WINANS AND AUDUBON WINANS, PARTNERS, as Winans Bros., defendants.

Order.

Comes now into court, this 22nd day of October, A. D. 1897, S. C. Henton, the special examiner appointed by this court, to take and report testimony in the above-entitled cause, and files the testimony taken and his final report.

And it appearing to the court, after due consideration, that the said examiner is entitled to the sum of six hundred dollars in full for the services rendered and expenses incurred by him in taking said testimony.

It is therefore ordered and adjudged that the United States, as plaintiffs, do pay to the said S. C. Henton, the special examiner as aforesaid, the sum of four hundred dollars.

And it is further ordered and adjudged that the defendants in this cause, Linneas Winans and Audubon Winans, do pay to the said examiner the sum of two hundred dollars for the taking of defendants' testimony, and a copy of all testimony, furnished to them at their special request in said cause by said examiner, said payment on the part of said defendants to be made within ten days after the signing of this order and the service of a copy hereof upon the said defendants or their attorneys.

Dated this 22nd day of Oct., 1897.

C. H. HANFORD, *Judge.*

(Filed Oct. 22, 1897, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.)

73 United States circuit court, district of Washington, southern division.

UNITED STATES OF AMERICA ET AL., PLAINTIFFS,
v.
LINNAEUS WINANS AND AUDUBON WINANS, partners as Winans Bros., defendants.

No. 122. Filed Feb. 23rd, 1903.

Memorandum decision on the merits.

My opinion with respect to the law applicable to this case has been fully set forth in the opinion upon the demurrer to the bill of complaint in this case, 73 Fed. Rep., 72, and in the case of the United States *v.* The Alaska Packers' Association, 79 Fed. Rep., 152, and in the case of the James G. Swan, 50 Fed. Rep., 108. As the rulings of this court in the cases referred to have not been reversed nor criticised by the higher courts, I am disposed to stand by them, and it is not necessary to reiterate what has been heretofore said.

After the ruling on the demurrer, the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfere with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands to which a perfect absolute title has been acquired from the United States Government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to
74 do so. The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States.

Let a decree be entered dismissing the case.

C. H. HANFORD, *Judge.*

(Filed Feby. 23rd, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.)

75 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, plaintiffs,
v.
AUDUBON WINANS (SUED AS JOHN DOE WINANS) and Linnaeus Winans (sued as Richard Roe Winans), partners doing business under the firm name of Winans Bros., defendants.

Final hearing in this cause having been had on May 20, 1902, and court not being then fully advised in the premises, took the same under advisement, and thereafter and on February , 1903, having filed its memoranda of decision on the merits herein, now at this time come the defendants by their attorneys, Carey & Mays, and move the court to enter a decree herein in accordance with its said decision, and the court now being fully advised herein, after a full consideration of the pleadings and the evidence and the stipulations of the parties made at different times herein, finds that the plaintiffs are not entitled to the relief prayed for, or any part thereof, and that there is no equity in plaintiff's cause, but that its said cause should be dismissed and that a decree should be entered dismissing the case. It is therefore considered, adjudged, and decreed that the said cause be, and it hereby is, dismissed.

C. H. HANFORD, *Judge.*

Dated May 28th, 1903.

(Endorsed:) Filed in the U. S. circuit court, dist. of Washington. May 28, 1903. A. Reeves Ayres, clerk. By H. M. Walthew, deputy.

76 UNITED STATES, THOMAS SIMPSON, AND White Swan, plaintiffs,
vs.
LINNAES WINANS AND AUDUBON WINANS, partners as Winans Bros., defendants.

Testimony and final report of examiner.

Filed Oct. 22, 1897, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

77 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES, THOMAS SIMPSON, AND White Swan, plaintiffs,
vs.
LINNAES WINANS AND AUDUBON WINANS, partners as Winans Bros., defendants.

Testimony. Testimony taken in the above-entitled action before S. C. Henton, esq., special examiner.

Appearances:

Wm. H. Brinker, U. S. attorney, for plaintiffs.
F. C. Robertson, asst. U. S. attorney, for plaintiffs.
F. P. Mays, for defendants.

78 In the circuit court of the United States for the district of Washington, southern division.

THE UNITED STATES, ET AL., PLAINTIFFS,
vs.
WINAN BROTHERS, DEFENDANTS.

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83 Following stipulation plaintiff's Exhibit "B," being letters and telegram to register and receiver U. S. land office at Vancouver.

"B" telegram, "C" letters.

Following foregoing exhibits, documentary evidence of defendants.

Patent United States to Orson D. Taylor.

Patent United States to William P. Murphy.

Patent United States to William Taylor.

Contract between the State of Washington and S. Farrell.

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Plaintiff's Exhibit A. Plat of fishing grounds and location of fish wheels.

84 UNITED STATES
vs.
LINEAN WINANS AND AUDUBON WINANS, doing business as Winans Brothers. } 122.

Order of reference.

Now, on this 12th day of November, 1896, upon motion of the United States attorney, it is ordered that this cause be and the same is hereby referred to S. C. Henton, esquire, of North Yakima, as special examiner, to take and report the testimony in this cause.

November 12, 1896.

C. H. HANFORD, *Judge.*

I, Reeves Ayres, clerk of the United States circuit court, ninth judicial circuit, district of Washington, do hereby certify the foregoing to be

a true and correct copy of an order of court made on the 12th day of November, A. D. 1896, as the same appears of record in my office at Walla Walla, Washn.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By CHAS. B. JOHNSTON,
Deputy Clerk U. S. Circuit Court.

85 This stipulation this date entered into by and between F. C. Robertson, assistant United States attorney, solicitor for the complainants, and F. P. Mays, solicitor for the defendants, witnesseth:

It is hereby agreed that, in order to facilitate the taking of testimony before the special examiner and to reduce the record, that all of the testimony hereafter to be taken shall be taken subject to any and all objections as to its irrelevancy, materiality, competency, or for any other cause whatsoever, at the time of the hearing of said cause, by motions to strike or otherwise, any objections of said testimony, the said objections to have the same force and effect as if they were noted at the time of taking said testimony and produced in the record.

86 In the circuit court of the United States, district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and WHITE SWAN, plaintiffs,
vs.
A. AND L. WINANS, DEFENDANTS.

This cause coming regularly on for hearing at the city of North Yakima, before S. C. Henton, U. S. commissioner, acting as special examiner to take the testimony herein, the following proceedings were had and done:

Hearing commenced May 6th, 1897.

Present, F. C. Robertson, assistant U. S. attorney, attorney for plaintiffs.

The defendants being personally present with their counsel, F. P. Mays.

It was stipulated orally between the respective counsel that the testimony herein might be stenographically taken, produced in longhand, and certified to the court without the signature of the respective witnesses thereto to have the same binding force and effect as though the said testimony was subscribed by the respective witnesses.

THOMAS SIMPSON, called as witness for the plaintiffs, being first duly sworn, testified as follows:

Charles Wannassay sworn to act as interpreter.

Direct examination by F. C. ROBERTSON:

Q. What is your name?
A. Thomas Simpson.
Q. Where do you live?
A. Used to live down on the Columbia River—that is where I was born and raised, on the Columbia River.

87 Q. What part of the Columbia River?
A. Born and raised where Winan's fish wheels now are.

Q. You are one of the plaintiffs?

A. Yes, sir.

Q. How old are you?

A. I don't know; Indians don't keep track of their age.

Q. How old were you when the treaty was made between the United States, through Governor Stevens, and the Yakima Nation of Indians?

A. I was born at that time. I don't know how old I was, but I remember all that time during the treaty.

Q. State what you know about the Indians catching fish in the Columbia before the treaty.

A. Yes; before Governor Stevens, the Indians were there. At that time there was an Indian town, before the whites came in. And after the treaty the Indians were removed to the Yakima Reservation. Of course we moved away from there, and left some old houses where they dried fish. There was 11 of these Indian houses there; there was no wheel there; no farm, no fence; and after that I went back down to the Columbia. At that time, when we came away, we left Wah-su-leth and his wife there. Of course when we come back we came after some salmon. Of course we had no trouble getting the salmon, and few years after we went back there, and we seen some fence there; this land was fenced; that place was our fishing ground; it was so great the Indians always lived there. There was some other fishing ground that was around that place that was just small fishing ground; that was above another place, a little above that; another little town; and another further down. There was also fishing ground and Indians lived there, and of course at that time we found out there were wheels put there. I did not know who put the wheel. Where we used to live, that was where this wheel was put up. There was fences. Several of us went. I went myself in the wagon. There was Mr. Wheldon there and also Mr. Taylor—O. D. Taylor. Wheldon told me at that time, don't
88 you come in any more here or you will be punished under the law. Of course I stopped right there. Then I went there—of course I can't go in. I went further up and there was few Indians there; and now to-day, where the big fishing ground is, there is wheels there now, and it is a good many years since I quit going there. Sometime I go there. I don't go to that old fishing ground just a little above it; it is all fenced close to the river now. This last spring I went there. There was fence there halfway. It is all fenced now. It is fenced all up by the river now—all where the fishing grounds were, and the Indians can't get in there any more to catch their fish. That is as far as I know, and of course——

Q. Do you know how the Indians approach the river to fish before the treaty was made?

A. There is one trail comes down from up above, down along the river down there, and right there at this fishery there is a trail comes at right angle to the river. Right there by Winans comes a trail from down the river.

Q. Did those trails exist at the time of the treaty?

A. Yes, sir; that is, the road that was announced at that council during the treaty.

Q. What was the names of those three trails?

A. Skook-skit (eel's mouth).

Q. Was that the upper trail?

A. No; the lower trail.

Q. What was the middle trail called?

A. I don't know the name of the middle road. I know the upper road; it was called Kah-tum-wah (muddy spring).

Q. Ask him to state whether these trails were plain trails at the time of the treaty.

A. Yes; they were plain trails; were used all the time. Some people going after wood, some after berries. That trail was used all the time.

89 Q. Were the trails well beaten by animals traveling over them—cut into the ground?

A. The trail was used as a wagon road; was plain trail, beaten down. They traveled horseback there and afterwards they built a wagon road there.

Q. Did all three of these trails come together on the Columbia at the fishery?

A. Yes; all come right to that fishery there.

Q. What trail was traveled by the Indians after they removed to the reservation?

A. We used the middle trail and the one above—two trails that is used coming out this way to the reservation. That is the way we come out and go in. One of the trails is fenced up—the middle trail. Also the lower trail. We use the upper trail now.

Q. How far can you travel along the river on the upper trail?

A. We use that trail from up the hill down to the river. I don't know how far, how many miles; about two or three miles; I don't know exactly.

Q. State the way the Indians used to fish before the treaty.

A. They got dip net and dipped them, and they speared them; they put out sticks and made a stand to dip—trestle to stand on to dip.

Q. How many Indians used to come to fish at the river, at the time of the treaty, a year?

A. They come from all parts, and I can't tell how many. All the Indians come there; and now it is all fenced; makes the place very small, and of course if all the Indians went there now there wouldn't be any room for them there. All these reservation Indians goes down there after salmon, and now it is all——

Q. Did the Indians go every year up to the time they were stopped?

A. Of course, now, they can't catch any salmon; the wheel is catching them all.

90 Q. If, starting on the Columbia River a half mile below the first fish wheel of Winans and going along up the river a half mile above the point on the rapids where the scow fish wheel was anchored there is any other fishing place?

A. That is all fishing ground between those two points.

Q. That shore line of the river is opposite to section 25, township No. 2 N., R. 13 E., section 19; and section 30, township No. 2 N., R. 14 E. I will ask if all that shore line is where the Indians were accustomed to fish?

A. Yes, sir; that there is their fishing ground before the whites come in there. When I was just a boy I seen them there. We were eating at that time nothing but fish. That is all the time where they used to fish.

Q. Was that fishery spoke about at the time of the treaty?

A. Yes; they give it to them all for fishing ground along that river—that was Governor Stevens and Gen. Palmer.

Q. Was that the principal fishing ground from where the Indians got their food?

A. Yes, sir.

Q. Do you know where the fish wheels now are of Winans?

A. I know one of the fish wheels where the old fishing ground is—that is, the lower—and that was the old accustomed fishing ground where the old orchard is now.

Q. Who lives where that old orchard is and the fish wheel?

A. Winans Brothers, the defendants; one of the defendants. That is the big fishing ground of the Indians.

Q. Why is that a good fishing ground, and who do those fish wheels interfere with; the Indians fishing there?

A. There was a standing rock there—fishing ground—and that was all blasted out, and is now a fish wheel instead of a standing place.

Q. Who did that?

91 A. Winans; I seen them there working.

Q. When was that rock blasted out?

A. Seven or eight years. I was here, of course, on the reservation.

Q. Were these houses that were erected by the Indians there necessary for curing fish? And how did they cure them and take them to the *to the* reservation?

A. They get the fish there and take them to that place and dry them up on that house; hang them all along and take some and sun dry and pound them fine; when they dry them they use that for winter supply.

Q. How great a proportion of the winter's food did the fish make?

A. That is the greatest food they have; that and camus, and berries; that is what they use; that is what raised us.

Q. How did they take the fish to the reservation? How did they carry them?

A. Sometime bring them on horseback and wagon; all kind.

Q. About how many pounds did each family take back?

A. They get good many pounds; of course they can't get any more now, the wheels get the whole thing; they get very little now, and when I go myself I don't get any; I go to the wheel and buy them; I give them money.

Q. Are there any good fishing grounds below the wheels?

A. There was a fishing ground some place, but it is all taken now. They catch all along further down, and the middle wheel catch a good many salmon. That is in the big fishing ground of the Indians, and, of course, there is no place to fish above. There is no salmon going by that wheel. There are very few go by and the Indians can't catch them.

Q. How many Indians now want to catch fish at that place, if you know?

A. All the Indians from this reservation would be willing to go to fish for the salmon, and all parts from the outside want to go there and fish.

92 Q. Would they fish there if not prevented?

A. Yes, sir; they would fish, and all would go their to-morrow, everybody, if there was no fence and wheel there.

Q. Was the fish wheels ever used by the whites and Indians at the time of the treaty?

A. No; there was no wheel then; there was everything good at that time. All the Indians used to catch plenty of salmon and have a good time.

Cross-examination by F. P. MAYS:

Q. When were the fish wheels first put there?

A. Seven or eight years when the first—I can't tell just exactly the year.

Q. Were there any fish wheels there when you speak of Wheldon being there and having a fence?

A. No; after that I went again there was wheels.

Q. How many fish wheels are there there?

A. Two or three and one scow.

Q. How far from the one lowest down is it to the one furthest up?

A. I can't tell whether it is two or three miles.

Q. How far apart are the wheels from each other?

A. About a half or quarter of a mile between the two lower; between the next two can't tell; it is a little further or about the same distance; about one mile.

Q. Is all the fishing ground fenced?

A. Yes; it is all fenced I seen.

Q. Isn't there a fishery above any of these wheels?

A. No; there is no falls anywhere above this scow.

Q. Isn't there an old fishery above the Colwash Bottom?

A. No; there is no fishing ground there above.

93 Q. Do you know where Jensens farm is?

A. It is way up above.

Q. Isn't there an old fishery there?

A. No; I don't know there is any there.

Q. Don't you know that there has been a fishery up there as long as there has been anywhere in the river?

A. No, I don't know; that is away up above us.

Q. I mean about a half mile above where Winans fish.

A. There is no more falls above Winans Scow.

Q. Arn't the Indian dry houses up there on the bank yet used at that fishery?

A. I didn't understand at first; I thought you meant way up at Jansens place.

Q. Well, is there any old fishery anywhere above where the Winans last wheel is—between there and Celilo?

A. That is another falls up there—Skin they call it—above Jensens, across from Celilo.

Q. Isn't there an old fishery there?

A. Skin is just like Wish-pahm; there is another fishing ground there. There is another Indian town there.

Q. Isn't that one of the old fishing grounds also?

A. It is just like what we are speaking of now, Wishpalm and Skin; they are both fishing grounds.

Q. And were both fishing grounds at the time the treaty was made?

A. Yes, sir.

Q. Were there any other fishing grounds like these two anywhere else in the country?

A. Of course, when the treaty was made we were told these fishing grounds were yours in all fishing grounds on all the streams.

Q. Question repeated.

94 A. Of course, above Dalles, and on opposite side of the river, there was another fishery.

Q. What was the name of that?

A. Cow-e-she-lah (meaning rock).

Q. Wern't there other fisheries still lower down the Columbia River?

A. No; I don't know of any.

Q. Wern't there down at the Cascades?

A. Yes; I know there was only one down at Cascades; that was another Indian town.

Q. Wasn't there one down at White Salmon?

A. Yes; they get white salmon there. That is another town.

Q. Wasn't there also Little White Salmon?

A. Yes; below White Salmon there is another, Little White Salmon.

Q. Wasn't there other fisheries up the Columbia at other places?

A. No; only them streams, White Salmon and Little White Salmon and Cascades; that is all I know. Of course them towns you named are all fisheries, just like the one we mentioned; that is all I know about the fish; that is, the old time.

Q. Are there any buildings now on the ground at Wishram, where the buildings were at the time of the treaty?

A. There was there Se-we-pam, the big town right at the orchard, now Winans house. The Se-we-pam is the big town. There is another little dry houses right above that, that is the old houses. Se-we-pam is gone now; there is not a house there. There is a few left at Wishrams to-day.

Q. Are any of these buildings which you say are now there inside of Winans fence?

A. To-day, Winans built a fence along the river, all fenced in the fishing ground, and the house standing close to the fence.

Q. Are the houses inside or outside of the fence?

A. I can't very tell you whether Winans own that river

95 because Winans the river. I did not know he owned all those rocks there and the river.

Q. Tell me whether the houses are outside or inside Winans fence.

A. I will tell you again—I am kind of mixed on your fence; I don't know whether you own from the fence back, or the fence towards the river. If your corners are up towards—the house is outside.

Q. Does the river overflow the bank there during the high water?

A. Yes; some of the rocks go under, some overflows further down the river.

Q. When is the main fishing season—low or high water?

A. Next month is the regular fishing season. There would be two months' fishing season.

Q. When the water is rising doesn't the fishing places change almost daily?

A. The coming up, of course they got different rocks they follow up as the river comes up, and when it goes down they follow it down.

Q. So it changes nearly every day?

A. They wait a number of days until the water comes just right and then they fish there.

Q. How far is it from Winans orchard to the nearest fish wheel?

A. Can't tell just how far; it is pretty close—big orchard, and down there is Winans wheel.

Q. Is it a quarter of a mile?

A. It is as far as across the street; that is the big town we mentioned. There is no mile mentioned there. It is right close.

Q. What now prevents and has prevented the Indians from going on this ground?

A. When we go there, there is fence there. We can't very well tear down the fence. Last year, when Winans put up the fence, he told
96 the Indians not to go near there or go in there, last year. Last year I went there and I seen. And they told me when I got there—all the womens and men along there—that Winans put up the fence along the river and tell us not to go in there any more, and some of the women were very nervous at that time—were scared. And of course I did not want to bother myself; I just hitched up and come home.

Q. If the fence was out of the way the Indians could come there and fish, could they?

A. That fence is put there and limited not to let any Indians go in there, and of course also the wheel gets all the salmon that come there.

Q. Do you know what is the Colwash trail?

A. I know. It comes to Colwashes house, where his house was—it comes right out. The name of the trail was Kah-klum-wah (worm); the whites called it Colwash trail. That is the treaty name for the trail, Colwash.

Q. Is the Colwash trail open now?

A. Last year I went there is the first time I knew it was open. I went direct to the river, and I never been there this year.

Q. Doesn't that trail run out from the river and up the hill and on over to Simcoe?

A. Yes; that Kah-klum-wah (worm) comes right up the hill and out this way. Of course there were some other little trails that never have been mentioned right up in the rocks.

Redirect examination by F. C. ROBERTSON:

Q. Of all the fisheries mentioned on the north side of the river, where was the principal fishery of the Indians at the time of the treaty and up to the present time?

A. Se-we-pam; that is the same place called Wishram, where Winans fish wheel is now. That was the main fishing ground mentioned at that time.

97 WHITE SWAN, a witness sworn on behalf of plaintiffs, testified as follows:

Direct examination by F. C. ROBERTSON:

Q. Your name?

A. My name is White Swan and Joe Stwire.

Q. You are one of the complainants in this action?

A. Yes.

Q. How old are you?

A. I am 74 years old.

Q. Are you chief of the Yakimas?

A. The great Father Washington appointed me chief of the Yakimas.

Q. Do you remember the treaty between the Indians and Governor Stevens forty-two years ago?

A. Yes; I remember it all.

Q. Do you know where these fisheries are on the Columbia River?

A. When I was a young man I know all of that fishery ground.

Q. Do you bring this action on behalf of yourself and all of the Yakima Indians?

A. Yes, sir.

Q. Listen to this a part of the treaty: "The exclusive right of taking fish on all streams where running through or bordering on said reservation is further secured to said confederated band of Indians, as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their cattle upon open and unclaimed lands." Do you remember of that provision?

A. I did hear that.

98 Q. I want you to explain, if you are sufficiently informed, what was the understanding between the Indians and Governor Stevens with reference to the meaning of the terms, the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory?

A. Yes, I know. When they made the treaty the big men—head men—every day *day* the council held for a month, and the second month they had not quite agreed yet, and second month, about the middle of the month; that is, the council, at that time announced to the council, saying what is the reason you do not agree to this good law; then the Indians said at that time we will now mention why we do not want to agree to this bargain. I do love my own food—that is, the salmon in the river, here it is very hard for me to say all right, I love to go and get my deer and berries up in the mountain, therefore I do not like to go to the little reservation and leave my fish. And then at that time Governor Stevens said, yes, I find out now what you want, I will agree with you now and tell you what you want—I will tell you what you want exactly. You people that live as far as Cascade, and as far as up to Wenatchee, you have your rights in this Columbia River to get this fish; the Great Father in Washington is not asking you for this river or this salmon, all the Great Father wants the land for whites to settle by and by. But as long as this world stays here you will have all the salmon you want in this river all the time. You will have a right to go up the

mountains and it will be open to you as long as you live. And of course at that time all the Indians along the Columbia River and down said all right, and if this is the case we will agree at this council.

Q. Were there any Indians at the council from the locality of the Wishram fishery?

99 A. Yes; they were there.

Q. What was the accustomed places and usual places of fishing on the Columbia at the time of the treaty?

A. They had accustomed—of course in different they had different fisheries all along the Columbia River. That is the chief fishery of the Indians where Winans wheels are now.

Here the further taking of testimony was continued until the hour of 9 a. m., of May 7th, 1897.

The hour of 9 o'clock having arrived the further taking of testimony was resumed pursuant to adjournment.

Q. State anything more within your knowledge concerning the extent of the fisheries where Winans wheels are?

A. They gave them this reservation and two fisheries—one at Wenatchee and a road to go there and one at Wisham and a road to go there. That little fishery was set apart to them the same as the Yakima reserve. Of course after that the Government sent out commissioners here to buy one of the fisheries and we have now sold the Wenatchepam fishery to the Government.

Q. For how much?

A. Twenty thousand dollars. Then after the Government had given us $20,000, we expended it in building irrigating ditches on the reservation. What Wisham fishery is our fishery yet, we have not sold that.

Q. Why did they sell the Wenatcheepam fishery?

A. That Wenatcheepam fishery is not as good fishing ground as the Wisham, and not everybody went to Wenatcheepam from here.

Q. Which fishery is the furtherest from the reservation?

A. The Wenatcheepam is the farthest and the road is bad.

Q. How many miles is it from the reservation where the Indians live to the Wisham fishery.

A. Sixty-four miles from the agency to the Wisham fishery.

100 A. (Continuing.) Therefore, we can not very well let the Wisham fishery go, for all the Indians like to go there from the reservation and also the Indians on the outside of the reservation like to go to the Wisham fishery. If at that time during the treaty the Government didn't agree to give us these fisheries we never at that would have agreed with the Government. Of course the treaty announced and said these fisheries are yours, therefore we can not let go. If the Government would send a man to see us about selling the Wisham fishery then we would see what we could do. Then maybe we could see whether we could sell that fishery or not.

Q. Are the Indians favorable or not to selling the Wisham fishery?

A. If the Government send a man to us to buy that fishery then all the Indians would gather and decide whether they could sell that fishery or not.

Q. Do the Indians want to sell it?

A. Of course the salmon is the main food for the Indians, and I don't think they would sell the fishery.

Q. How old were you when you first went to the Wisham fishery?

A. I lived just over the mountain 12 miles from the Wisham—that is, my tribe—and I went over there nearly every day and come back to my tribe.

Q. State whether or not any year since you were a little boy if the Indians have failed to go to that fishery?

A. We go all time, there the Klickitats and the Wishams live right there and fish every day.

Q. And the Yakimas, since they have removed to the reservation, have they failed any year to go to that fishery?

A. All time; pretty near all the Indians go from Yakima to Wisham every season, never fail to go there to get fish.

101 Q. Do you know where the upper fish wheel of the Winans Brothers is—the scow wheel?

A. Yes; I seen it.

Q. Do you know where the lowest fish wheel is, about half a mile below Winans house?

A. I know, and I have seen the wheel.

Q. With reference to the upper and lower fish wheel of Winans, where are the Wisham fisheries?

A. From the point at the upper fish wheel down to the big eddy, that is the fishing grounds; that is the swiftest part of the river.

Q. How were the salmon caught by the Indians at the time of the treaty?

A. Their way of catching that salmon there was spearing, hooking, and dipping—a long stick and a gaft hook.

Q. Now, if the Indians are stopped from fishing between the upper and lower fish wheel of Winans, is there any other place along there where they can catch salmon?

A. No; it would be pretty hard; there is no other place where we could fish like that place.

Q. How long has this place been used as a fishery?

A. I can not tell you when this fishery commenced—when I was born and I come to know anything, they were all the time fishing there.

Q. State whether or not the Indians at or near the fishery erected any structures or houses, either to live in or cure the fish.

A. Each family had a dry house, smokehouse—a long house there near the fishery.

Q. What else?

A. The Wisham, then, when they get through cleaning the salmon at the fishery, they moved just above the falls; that is where they

102 wintered. I can not tell you that Winan Brother had taken them house, but I know O. D. Taylor took them houses down and moved them away—eight years now since they moved and tore them old houses down.

Q. When were the last fish houses torn down there?

A. All I know is the first fishery that was in Se-we-pam; that is the house that was torn down 8 years ago.

Cross-examination by F. P. MAYS:

Q. By whom?

A. O. D. Taylor, I said.

Q. Are there any canneries at or near the We-nat-che-pam?

A. No; there is no canneries there; it is a bad country at We-nat-che-pam?

Q. Are there many people living about there?

A. Not many.

Q. Are there any railroads or cities near by?

A. There is a town there near, at Wenatchee; not large. I don't know myself about railroads.

Q. When did you people sell that fishery?

A. Three or four years ago; I can't remember.

Q. Have you sold any of the other fisheries that you had at the time of the treaty?

A. These fisheries—the Wisham—they belong to all the Columbia, Cascade, and Yakima; this fishery belongs to the Indians, and they never sold that place at any time; no.

Q. Were there not other fisheries on the Columbia River besides Wisham at the time of the treaty?

A. The treaty gave them all this reserve—two places, Wisham and Wenatcheepam—and the treaty also gave the Indians the rights to fish all along the Columbia River. Of course, there were other fisheries on different tribes all along the Columbia River.

103 Q. After the Indians went on the reservation, and ever since then, the Indians' use of salmon has gradually grown less, has it not?

A. They could not very well without salmon get along—the Indians were raised with salmon and they want salmon all the time.

Q. Hasn't the use of it grown much less since you got to farming and that sort of thing?

A. I can't myself get along without the salmon. I don't know how to eat hog meat; I don't like it very well myself, and that is the way with the other Indians, I suppose.

Q. Have you been to the fishery of late years?

A. Of course I used to go every year, but since they have had so much fight about the fishery—I am pretty bad myself and I don't want to fight with anybody is the reason I don't go any more now. My wife is a Wisham is the reason I went there every season until here of late years.

Q. When you go there to get fish do you catch them yourself or buy them of the other Indians?

A. When I always go there and my wife's relations, they are Wishams, they give us the salmon; they furnish the salmon, the Wishams.

Q. Do the Indians there sell any of the fish they catch to the whites?

A. I never been posted on that; I can't tell you whether they sell the salmon to whites or not.

Mr. MAYS. That's all.

Mr. ROBERTSON. That's all.

CHARLEY DICK, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

By Mr. ROBERTSON:

Q. State your name.

A. Charley Dick.

104 Q. Charlie, do you know A. and L. Winans, the defendants in this action?

A. I know all of the Winans.

Q. How long have they been in the fish business on the Columbia?

A. I have been here six years on the Columbia and they were there when I came. I worked for them.

Q. What work did you do for them?

A. I worked for them in building a fish wheel and fixing nets. I worked in building the first fish wheel.

Q. Where was that fish wheel built?

A. It was built by the orchard where Winans house now is.

Q. Where was the next fish wheel built, and how long ago?

A. There was a fish wheel built below, used by the Winans, before I come.

Q. What else did you do for the Winans?

A. I worked for them bossing, one year they were dipping with nets, time of high water, when all of the wheels were washed away.

Q. When you went to work there for the Winans were there any old Indian houses for the curing of fish along the river there?

A. None right at the orchard, but above, at Wisham.

Q. Was that below the point where the scow wheel is?

A. Yes, sir.

Q. Describe those houses.

A. They had long houses, kind of sheds, to dry salmon; maybe two or three families in one shed, 60 to 80 feet long and 40 feet wide.

Q. How many of those houses were there?

A. Six.

Q. Where are those houses now?

A. Some are there yet, some tore down, and when they come back they put them up again.

Q. Who tore them down?

A. The Indians would tear them down and pile the poles up
105 and when they would come back they would put them up again. There were six left standing.

Q. Now, Charley, what did you have to do about keeping people from fishing along the fishery from the point up here down to the big eddy?

A. I was bossing he claimed; it from the eddy to the upper or third wheel. Winan and he said, don't allow anybody to come down here to fish. He just allowed his own men; they were working for wages; he told me they could fish above the third wheel. Winans had it fenced from his house to the third wheel.

Q. He has got the point fenced in now, has he not?

A. Now he has fenced in what he said belonged to the Indians; he fenced up about a quarter, and has that point where the fourth wheel is fenced in.

Q. So he does not allow the Indians to fish at all now along that fishery, does he?

A. No.

Q. When did he put up this last fence?

A. A year ago this spring.

Q. Why is that place valuable specially as a fishery?

A. There is a swift current; the current runs right close to the shore and that is the only place they can catch fish with a net.

Q. How many fish a day did any ordinary fisherman take with a net when those wheels were washed out and you were foreman?

A. I can't tell how many; they would catch a good deal, though. At that time fish run thick, and catch about half a ton or pretty near a ton a day.

Q. Did they catch them with a net the same way the Indians used to catch with a net?

A. Yes, sir.

106 Q. What effect did the putting of the fish wheels have on catching fish with nets above the wheels?

A. They catch some.

Q. Many?

A. Not many; some, not like they used to catch before the fish wheels were put in.

Q. The fish wheels catch practically all the fish?

A. Yes.

Q. When the fish wheels were running Winens did not have anybody fishing with nets, did they?

A. Yes.

Q. How many men?

A. I don't think they do have any men dipping with nets.

Q. What did he tell you to do with the persons that would not go off the land?

A. He told me to order them off and if they did not go he would have them in Goldendale.

Q. What did Winans tell you do with the Indians with reference to keeping them off?

A. He told me if they did not go off he would get the sheriff and make them go.

Q. Did he have anybody besides you to keep these Indians off besides yourself?

A. Not that I know of. I went down there to fish last year and saw a man there; he knew me and let me fish and did not attempt to put me off. The people told me he was putting everybody off, but he did not put me off.

Q. What effect does putting these fish wheels have on the fish running in the ordinary channel?

A. I suppose they run in the same place all the time; there is a strong current and they have to run in close to the shore.

107 Q. How many fish a day, in the fishing season, do each of these fish wheels catch?

A. I could not tell you; I never weigh them. I was told by E. Winans that in the big run they caught 30 tons a day with four wheels.

The fourth wheel is a mile and a half below, and not on the land in controversy.

Cross-examination by Mr. MAYS:

Q. You say Mr. Winans was willing for the Indians to fish above where he had his enclosure, was he?

A. Above the third wheel—yes, sir.

Q. Isn't it good fishing above there, too?

A. Yes; there is just—it is not as good as See-we-pam.

Q. What is the fishery above named?

A. Wisham.

Q. Isn't it good fishing there, too?

A. Yes.

Q. Isn't it at times better than down at See-we-pam?

A. I said it is not as good at Wisham; the See-we-pam is better. When the river is away low they don't fish at See-we-pam at all; they fish above.

Q. At which place can you fish most during the whole fishing season?

A. Since I have been there six years ago the wheels have been put in, and they won't let them fish any more. They claim it is better fishing down below.

Q. Haven't the Indians fished there every year, more or less?

A. Where?

Q. See-we-pam and Wisham, both.

A. Since I have been there they have always fished at Wisham; they won't allow them to fish at See-we-pam; they have a fence around it.

108 Q. Haven't the Indians fished more or less, even where Winans had their fences?

A. Down below?

Q. Yes.

A. I never see them fish there.

Q. How much does the water usually rise there, along where the wheels are?

A. I could not tell you that. I know at the upper fishery—the Wisham fishery—it overflows.

Q. Does it not overflow at See-we-pam, too?

A. No; it makes better fishing when the river is high. Only at one time, when the river was awful high, it overflowed.

Q. How many men did you have working under you?

A. I think 12; somewhere along there—ten or twelve.

Q. Didn't you have twice as many as that?

A. No. I didn't have 20.

Q. What were they, Indians or white men?

A. Indians.

Q. Would they fish at the same place each day?

A. They changed around; when the water goes down they would change. They would all fish at See-we-pam when the water come up.

Q. That was a handy place to get the wagons in, was it not?

A. Yes; the other place overflowed; they could not fish above. They change different places above and below where they fish; they don't fish at the same place on the bank; they have to change down the river, or up the river, where they can find a good eddy.

Q. Are the eddies at the same place each day, or do they change as the water rises and falls?

A. They change every day if the river raises fast, you know.

109 Q. So that when the river is rising or falling they change the fishing places accordingly, do they?

A. They change the place when the river is raising and they follow the same place when the river goes down again.

Q. The run in 1894, when you was foreman, was the biggest run they have ever had since you have been there?

A. Yes; they had the biggest run they ever had.

Q. Do many Indians come there to fish of late years?

A. Well, they never go down to fish at See-we-pam; they go to the other place; they have See-we-pam fenced, and when the wheels are going they don't want them to fish, and last year they had a fence around all of this above.

Q. Do you know where the Indian village is there?

A. Yes.

Q. Where do the Indians come to when they come there to fish in that locality?

A. They come to the village and go right straight down to the river bank.

Q. Do they use this Indian village when they come there?

A. Yes, sir.

Q. For what?

A. To dry fish.

Q. What trail leads from the reservation down to this Indian village?

A. I don't know the names; I am not posted.

Q. Do you know the Colwash trail?

A. I don't know which one they call the Colwash trail; I have not been there long enough.

Q. Is there an open trail leading from the mountains on this side down to that village?

A. It is all open so you can get down to the village.

110 Q. Do the Indians take their wagons over this trail also?

A. Yes, sir.

Redirect examination by Mr. ROBERTSON:

Q. How far is the place on the fishery called Wisham from the place on the fishery called See-we-pam?

A. It must be about a half mile or three-quarters.

Q. Wisham is a place—used to be a place to fish with nets when the water was low?

A. Yes, sir.

Q. See-we-pam when the water was high?

A. Yes, sir.

Q. Both of those places are fenced in now by the Winans?

A. Yes, sir.

Q. So the Indians can't fish at Wisham at low water, or See-we-pam at high water?

A. No; they can't fish at either place.

Q. Winans first fenced in the high-water fishery?

A. Yes, sir.

Q. Now he has fenced in the low-water fishery?
A. Yes, sir.
Q. And those are all the fisheries there?
A. Yes, sir.
Q. Where is this village you spoke of—how far from the river?
A. Well, about a half mile when it is low water, and when high water, only about three hundred yards.
Q. Was that above or below the point at the beginning of the rapids, or head of the rapids?
111 A. That is, the village is below or pretty near west of the point of the rapids.
Q. Look at the plat, section 19, Bill Charley for his wife Klickitat Charley, isn't that village in this section here? (Witness indicates a point within the quarter section marked Bill Charley for his wife Klickitat Charley.)

Recross-examination by Mr. MAYS:

Q. There are other fisheries above and below those fisheries you have been talking about, are there not?
A. I have not been long enough here to know about all of the fisheries on the river. I know just where they fish there.
Q. Arn't there some wheels down below the big eddy?
A. Yes; there are wheels below the big eddy.
Q. Isn't there a fishing place up where the Indians go near to Celilo?
A. I don't know; I can't tell what I don't see.
Q. What, if any, use do the Indians make of the fish they catch besides taking them to the reservation?
A. You can't prove that by me; I don't know anything about it.
Q. The year when you were there didn't the Indians catch fish and sell to Winans?
A. They worked for them for wages by the day.
Q. I don't mean those that worked for Winans; I mean didn't other Indians catch fish and sell them to Winans?
A. Yes; they sold some to him pretty near closing season. It didn't pay then to hire them by the day.
Q. Don't some of the Indians catch fish and sell them to cannery people?
A. I don't know anything about that.
Q. Don't you know Jake Andrews?
A. Yes; I know him.
112 Mr. MAYS. That's all.
Mr. ROBERTSON. That's all.

MOSES STRONG, a witness sworn on behalf of plaintiffs, testified as follows:

By Mr. ROBERTSON:

Q. What is your name?
A. Moses Strong.
Q. Where do you live?
A. On the Yakima Reservation.

Q. How old?

A. I can't tell you exactly, but I think I am sixty-five.

Q. How old were you when the treaty was made between Governor Stevens and the Indians?

A. I guess I was about 25 years of age at that time.

Q. What do you know about this fishery where Winan's fish wheels are now?

A. When I was a young man I seen nothing but Indians there. We eat salmon at that time and deer meat and some roots and berries. That is the kind of food my father raised me on. When fishing season come they all then went down there to fish. There was a good many old people at that time. There was so many of these old men were leading men, and each of those leading men had a particular fishing place, and when they moved every summer each one had his own fishing ground where he camped and fished. They made kind of a crooked stick and put a bone on the end of it. They get this wild thread, then they make a long handle to it, and that is what they use to dip the salmon with. They build a kind of stage, two sticks like that to stand on, they get a stick or willow with for roap, and there they stand and dip away for salmon when the water was high. When the water was low they made a spear
113 out of bone, then they can see clear down to the bottom and spear the salmon. They used to have a long house, just like a shed, made pretty low. They put some weeds on top with stick all around—did not have any tents, canvass, at that time. They cooked their fish, put them on a stick and roast them by the fire. And the women folks they cut up the salmon and dry them. They put along on the rocks and ground and sun dry them, then the' smash them up with their hands, and when they are cured that way they break them up with rocks and keep that for their winter supply. That is the way they used to do when I was a boy. Catch a good many salmon. They used to come from all parts. Not many of the Indians had horses them days. Most of the Indians come afoot and catch fish right there in fishing places. Those that lived right there at the fishery would let all of these Indians fish all summer. When the drying season was over then they dig to catche the salmon. The big chief, the leading men at this place, his name was See-we-pam that lived at this big fishery. Rock that was standing there was just like a great chief. From that rock and twenty feet back there the house, one twenty feet from this fishing ground. That is the oldest house there. There were houses all along then from there and also further down. Another place was called Wa-ka-lt-ch, a little below See-we-pam, about half a mile. There was another place further down from Wa-ka-lt-ch, about another half mile, Ka-la-keah. Of course, there were houses in each fishing ground. That is where I was raised, and all of these people died. There was then there all the time at See-we-pam and Wisham, two places, and at this time Gov. Stevens and Gen. Palmer come there and made the treaty with the Indians. The Indians kind of woke up and got scared. They listen at them, then they made the treaty. Of course they could not agree to it. The old men stooped down and think about it. Gov. Stevens and Gen. Palmer give lots of good, sweet talk to them. Of course I was a young man, but I knew everything

then. Below Dalles about three miles, that is where the council
114 was held. They were there three weeks. Then there was some party come from above from Rock Creek, this side the Columbia River. Wi-shack-ne-path was the chief there. Another chief was She-ak-eth and others. Gov. Stevens said, "This country is yours. As whites we want it now. The Great Father thinks that way. He sends us here to make a treaty with you Indians." Where—the fishing ground at that place was given all to the Indians. Told them, "You shall have your fishing ground as long as you live." Told them "That is very true what I tell you. The sun is listening at me. As long as you live in this world you will have your fish, deer, roots, and berries. It is yours all. By and by the Government will always protect you. Also there will be a man sent there as agent that will look after you all the time," and we said "All right."

Q. At the time of the treaty how many well-traveled known Indian trails were there leading to the Wisham fishery?

A. There was four roads up in the hills. There was two roads come into that place and there were four roads further back and one along the Columbia down. One from up the hill, one from Simcoe. One from below the Columbia. There was only two roads come right in there.

Q. Where did they come from?

A. One was coming from above Rock Creek and one was going direct from here. One road was coming from Klickitat and one was coming from Hood River.

Q. Now, just where did these roads strike the Columbia?

A. This road come to See-we-pam; the upper trail come into Wisham first.

Q. Can he travel this old trail to See-we-pam now?

A. I didn't see the trail to-day. I last saw it last year. I went to Wisham. They told me there was a wheel at See-we-pam, there the whites were catching salmon. I went down there first. I went about half a mile. There was a wire fence. I went under it. I got there to
115 the wheel. When I got down to the wheel I seen the chief fishing ground. There was the wheel. That rock was all blasted out, and there the wheel was put in. And I seen one man hoeing potatoes where the camping ground was. This was See-we-pam; that is what I saw last year. I sat down a little while there. I took one quarter out of my pocket. They told me no free fish here. You have to buy your fish. I took one quarter out of my pocket and give it to the man and he gave me a little salmon. There was a little house there this side of Wishan. The house was empty; there were no fish there. They told me there was no salmon there. The Winans down there he throw away eels. We go and pick that up. That is what we use now. I stayed there four days and that is all the salmon I eat—the one I gave a quarter for—and I come back home.

Q. When were the houses at See-we-pam removed?

A. I never seen—only what I have heard.

Q. Where was the principal fisheries known to the Indians at the time of the treaty?

A. Wisham, See-we-pam.

Q. How far was the council at the time of the treaty held from the fisheries?

A. I don't know how many miles from Wisham to The Dalles. It was three miles from The Dalles to where the council was held—I think it fourteen miles.

Q. Did the Indians give up fishing or did they continue to fish at the See-we-pam and Wishpam fisheries until they were stopped.

A. They fished all the time.

Q. Have the Indians quit eating salmon?

A. No; they want to eat salmon all the time.

Cross-examination by Mr. MAYS:

116 Q. And hasn't the use of salmon by the Indians gradually decreased for many years past?

A. Yes; some.

Q. Do the Indians on the reservation raise cattle?

A. Some; but good many don't raise any.

Q. What kind of stock do they raise?

A. Some grain; most is horses.

Q. Cattle, sheep, and hogs?

A. Not many sheep and there are some hogs. Some raise cattle.

Q. Do many of the Indians farm?

A. Yes.

Q. This has all been done by them since the time of the treaty, has it not?

A. Yes.

Q. Mr. Winans gives the Indians the eels, does he not?

A. Yes; I seen him once myself give the eels.

Q. When the water is rising and falling, would the stages they fish from have to be moved?

A. Yes.

Redirect examination by Mr. ROBERTSON:

Q. What do you mean when you say the consumption of salmon by the Indians has increased some?

A. I mean, like this, that Winans now won't allow them to go in there and they can't get any more to eat.

Recross-examination by Mr. MAYS:

Q. Hasn't their use of salmon decreased or hadn't it before Winans were about there at all?

117 A. At that time and after Winans. Before Winans they were eating more salmon there and after Winans came there it was very hard for them to get any salmon; that is what I mean.

Q. Hadn't their use of salmon decreased before Winans went there?

A. Yes; it decreased right along; O. D. Taylor had shut them off. Yes; but they rather eat salmon more than anything else.

Redirect examination by Mr. ROBERTSON:

Q. Do the Indians still depend upon salmon for a part of their living?

A. Yes; they want salmon all the time.

Mr. ROBERTSON. That's all.

Mr. MAYS. That's all.

YOW YOWAN, a witness produced on behalf of plaintiffs, having been first duly sworn, testified as follows:

By Mr. ROBERTSON:

Q. Tell me all you know about the fishery on the Columbia where Winans fish wheels are?

A. I lived there most of the time, and last year I didn't go there. I see now it is all fenced and there are three wheels, and of course on account of those wheels the Indians can't get much salmon now. Last year I went myself and did not get anything there. The Indians told me we can't get any more salmon; Winans have ordered us off of there. Those parties that live at Wisham know all about it.

Q. When were the Indians stopped from fishing at that place first, if they were stopped.

A. At the time We-an-en-klah had the fight, I was there and
118 seen the fight. Wheldon's man was fishing there with a net and the other man come up behind and caught the net. There were a good many of us at that time during the fight; they stopped us from fishing.

Q. When was that?

A. Seven years ago.

Q. Was the fish wheel up then?

A. No.

Q. How many Indians were fishing there then?

A. There was Whealdon had 20 dip nets, but the Indians were there; they were not fishing much.

Q. Do you know how many trails there were coming to the water at the time, or before the fences of the whites were made there?

A. Four trails.

Q. Where did all the trails come from?

A. One from Rock Creek along the river down, and one from Simcoe, and one come from Klickitat. One all along the river coming up from Hood River.

Q. How many Indians each year from the treaty up until the time this fishery was fenced come there to fish?

A. I can't tell the number of Indians; there were so many come from different parts this time of year. I used to see them, and there would be a good many Indians.

Q. Do you know where the upper or Scow fish wheel of the Winans now is at the head of the rapids?

A. Yes; I know the name of that rock where the Scow lays now. It is named Wa-na-wish.

Q. If you exclude Indians from fishing between the rock at the head of the rapids and the eddy below, what good fishing ground would be left for the Indians there?

119 A. There would be none left.

Q. Where were the Indian settlements along this fishery?

A. There, right in the edge of them rock, where the See-we-pam camping ground was at the third or big wheel, close to Winans house.

Q. How many houses were there?

A. There were three large houses right there.

Q. How far from the place where Winans house now is?

A. The house was close to this wheel. Winans house is up in the top of the rock and the houses were right close to the wheel.

Q. Where are those houses now?

A. Whealdon tore all those houses down.

Q. How long ago?

A. About eight years ago.

Q. Before they were torn down by him were they each year occupied by the Indians?

A. Yes; they fish there all the time.

Q. Where were the houses located where the Indians cured their fish?

A. That is the houses I gave you.

Q. Did the Indians sleep in the houses and clean their fish there?

A. Yes.

Q. What other Indian houses were on the fishery there?

A. Wisham right there [witness indicating a point slightly below E. 2 NW. 4, sec. 30, T. 2 N., R. 14 E.].

Q. Slightly below the north line you mean?

A. Yes.

Q. Are those houses still standing?

A. Yes.

Q. How many?

A. Five.

Q. Can you get from those houses now to the fishery?

120 A. No.

Q. Why?

A. I am afraid of Winans.

Q. What other reason is there?

A. "If you go through my fence here," Winans says, "I will put you in the lockup."

Q. Do you know what effect the fish wheels there has on the fishing with nets and other ways the Indians catch the salmon?

A. They blast a rock and make a hole and put the wheel in there, in the channel where the salmon comes; then, if the river raises, they raise that wheel too. Two years ago, on Sunday, they used to raise that wheel and we used to catch all the fish we wanted. Two years ago he would not raise his wheel on Sundays, but kept it going and we could not get any fish.

Q. Did you try to catch fish when the wheel was going?

A. Yes.

Q. Did you catch any?

A. Sometimes one or two.

Q. When it was not going how many did you catch?

A. Sometimes each man got ten or fifteen salmon when the wheel was not running.

Q. How, in your opinion, does the wheel stop good fishing above, or what is the cause of it?

A. I think that wheel catches them all.

Q. Is there a fence between these old houses and the river?

A. Yes.

Q. Is there any fence on the outside of the old houses?

A. Yes; there is a fence way out.

Q. Do they have to get through that outside fence to get to the old houses?

121 A. There is a road down to the houses with a fence on both sides.

Q. If the Indians were permitted to use these old houses for dry houses, and to pasture the horses there, is that close enough to the fisheries to take the fish from Wisham and See-we-pam to cure?

A. Yes; it is close enough. We always fish at See-we-pam when there is high water, and if the water is low we fish at Wisham.

Q. On this plat appears the name of Bill Charley for Tommo-Sowit-Charley, also Bill Charley for his wife, Klickitat Charley; ask him if he knows who those persons are.

A. I know by the names you have mentioned I know them. Bill Charles house is right at the old dry houses.

Q. Does Bill Charley let the Indians camp there?

A. Yes.

Q. Does he let them pasture their horses there?

A. He says nothing to them.

Q. Is there a good pasturage for horses on this eighty and this eighty west half of section 19?

A. Yes, sir.

Q. And these lands marked as Indian lands behind the white settlers, is that good grass for horses?

A. Yes, sir.

Q. Is that plenty of land for the Indians to pasture their horses on along here?

A. All Indians just put their horses on Bill Charley's place; this is all fenced.

Q. It is not back behind, is it?

A. Yes; all fenced.

Q. Is there enough of pasturage land there unfenced for the Indians to put there horses around?

A. No; Bill Charley has not enough; there is no open land there, it is all fenced. Bill Charley's place is a little place.

122 Q. Is that fenced?

A. He has a little fence.

Cross-examination by Mr. MAYS:

Q. Bill Charley is a chief, is he not?

A. I don't know.

Q. Have Winans ever interfered in any way with these houses that are on that place?

A. No.

Mr. MAYS. That's all.

Mr. ROBERTSON. That's all.

WALKER, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Where do you live?

A. On the Yakima Reservation.

Q. What do you know about the See-we-pam and Wisham fisheries on the Columbia?

A. I know myself I had a fight there about the salmon seven years ago with Whealdon.

Q. Why?

A. He didn't want me to fish. I went from here when it was a fishing season to there.

Q. How many days did you fish there before you were stopped?

A. I just got there, and I was three days there, and I was not fishing yet, and it was the first day I was trying to fish. I had my net ready to fish, and I went down there to fish. I seen Whealdon's men all there on the fishing ground fishing, and I thought myself where will
123 I fish; and I seen there was a rock there that was not fishing ground, but I stand on that rock, and I tried my dip net there to see what I could catch. Whealdon had engaged all of the fishing ground; I was above his men, and I seen a man going up and down the river; I did not know that was the boss, and he seen me, I suppose, and I put my dip net twice, and he come after me, and I could not understand much in English myself, and he pulled my net and pulled me back, and wanted to pull me ashore, and I set down, and he could not lift me out. Then he thought he could not pull me up and he would shove me in the river. The second time he made a motion to pull up I thought I better follow him before I drown, and I follow, and he tell me in jargon I don't want you to fish here, go on; then we fight about this net we have in our hands. I want my net of course. He was a very tall man, and had a rock in his pocket. He struck me twice with a rock in my head.

Q. Did he ever go back again to fish there, Charley?

A. No; I never went back there any more after the fight.

Q. Did he drive off all the Indians?

A. Yes; he told us all to go away, and during that day he told all the Indians to go away, and, of course, when I got there I did not know that was the case.

Q. How many Indians had gone there that year to fish, from the reservation?

A. A good many Indians were getting there at that time in fishing season.

Q. After that time where else did they fish?

A. No place; one year would not allow the Indians to fish there.

Q. Where was this fight?

A. At the Wisham fishery.

Q. Where did you pasture your horse when you used to go there?

A. Along the road. I hobbled my horses, or kept them close
124 by the houses there.

Q. Is there any other good fishing grounds in that vicinity except between the point at the head of the rapids and down here by the eddy?

A. Their fishing grounds are from the scow down to the lowest wheel of these four wheels.

Q. Did he go to the fishery every year before the time of the fight?

A. Yes; every summer I went and fished.

Q. Have you gone any year since you were stopped?

A. Sometimes. I go now merely to beg for my people a few dried salmon.

Q. If these fences were not there would you go every year to catch fish?

A. If the fence was not there, and if the wheels were not there now, I would go there all the time, because salmon is what keeps me alive.

Cross-examination by Mr. MAYS:

Q. How old are you?

A. I am forty, I think.

Q. Were any of the Winans there at the time of the fight?

A. No.

Q. At the time of the fight he wanted to stay at one place, and Whealdon's men wanted to stay at that place also, did they not?

A. Yes, sir; that Indian country.

Redirect examination by Mr. ROBERTSON:

Q. What do you mean by this? Do you mean you wanted to fish at the same point where Whealdon's men were?

A. We claimed the same grounds, of course. Yes, sir; Whealdons wanted to use the ground themselves and fish.

Q. Was there plenty of room for you to fish there also?

A. No; there was no more room.

125 Q. Were you in the way of Whealdon's men?

A. No.

Q. They had plenty of room to fish?

A. Yes; they had plenty of room to fish.

Mr. ROBERTSON. That's all.

Mr. MAYS. That's all.

WINNEER, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. State what you know about these fisheries at the rapids where or known as Wishan and See-wee-pam.

A. Winans knows me. Of course he knows me, I think. I went down to fish. A man's wheel was tied down there, and at that time I went down there to fish at Wisham, and I heard further down, at See-we-pam, they were catching lots of salmon there. I seen lots of Wishams were working for Winans catching salmon. I thought I would take my net and go and fish, and that man [indicating the defendant] was there, and that man [Dick]. I seen they were catching a good many salmon. I catch a good many myself. I saw that man coming [Dick], and he said "I don't want you to fish," and mentioned Winans name. I did not say anything. I told Dick to go home. I was fishing. I wanted to get salmon for myself to eat. I was raised on salmon and I wanted

my salmon. White man was never raised by eating salmon. After while I saw Dick coming again, and I told him to go back and send Winans down to take the net away from me. When I looked back again I saw Charley Dick coming again. I took my net and threw it ashore. Of course Winan had ordered him. I went to Wisham and took my salmon there and went home. The Indians used to go
126 and steal fish there where Winans could not see them. Winans sent two men up along the river to watch the Indians. Of course the Indians were all scared and could not get many salmon. Some men get three salmon a day, some five, some one. They were scared of Winans.

Q. Where did you live when the treat' was made, and how old are you?

A. I don't know my age. I am pretty old, maybe seventy or more.

Q. Are you older than White Swan?

A. Yes; I am older than White Swan.

Q. Were you present at the treaty?

A. No; I was down at Vancouver at that time. I just merely heard the news.

Q. How long have you known See-we-pam and Wisham to have been the accustomed fisheries of the Indians?

A. I know where the big wheel is that was the main fishing ground when I was a boy.

Q. What—— Do you know how many trails was there to the fishing grounds?

A. Four trails.

Q. Describe them.

A. Along the river one, one down hill, one from below—four trails. That is all.

Q. Where do these trails all go to?

A. To See-we-pam and Wisham to get fish.

Q. How long did the Indians fish with nets?

A. They had nets all the time.

Q. Have you each year since the treaty, during the fishing season, gone to the Columbia to fish; and if so, where?

A. Myself. I was born there and raised there. I did not go much out, but fished there all the time.

Q. Is any of the fishing ground left unfenced?

A. No; that man over there [pointing to Winan] fenced every-
127 thing right down to the house past Wisham and up above. I went there and they told me, "Don't you go down the river; you can't go there any more." They told me if I went there, if Winan seen me going in there he would put me in jail. And of course myself I stand up and went down. Two men told me not to go. "If you raise the wire you will be arrested." I told them I am hungry for salmon, and I went down and raised the wire myself. I go in and see one man fishing there. I seen that man dip his net and look back and see if anybody was coming. He was afraid of Winans. And this man looked back and told me to go up in the high rock and see if I could see Winans coming. I told him to give me the net, and he gave it to me. I hold it down, but did not look back, and caught one salmon and went home. That man [Winan] was watching the Indians all of the time to keep them from going in there to fish. They said where my fence is that is my land towards the

river. I thought myself he can't do anything down towards the river; if he wants to farm he ought to take it back the other way. He could raise something there; this water belongs to the Indians; that is all I know about Winans. Winan tells the Indians: "If you make any trouble I put you right out of here; all this river is mine." The Indians just stand now and do nothing. That man over there [pointing to Winan] is an Indian now and we are white men. I mean by that he says, "I will eat the fish now and you will go hungry." The old women now they set down and cry. Some of the women go and tell—"I know where the wheel is"—that is, the big fishing ground where the house is. Indians from all parts of here go there to fish. Winans took that rock and blast it to nothing and put a wheel in. That man [Tom Simpson] and Louis Simpson they owned that place; they were the chiefs that owned that big fishery.

Q. Indicate on this map where the buildings were of the Wishams and See-we-pams.

128 A. Right in front of where Winans' house and the river; where the house now is.

Q. Where were the houses at the Wisham fishery?

A. They have never been moved; they are there yet.

Q. Where do you live now?

A. I fetch my children up here to send them to school on the reservation.

Q. Would you go back to the Columbia River every year to fish if you could catch fish there?

A. Yes; but I am afraid of Winans to go there. I go down now sometimes and get four salmon and come home. It is about 60 miles one way.

Q. Is there any other point that you know on the Columbia that is a sufficient fishing ground for the Yakima Nation of Indians?

A. That is the only place I know that is a fishing place for the Indians to go and get their salmon.

Q. Is that the old Indian fisheries?

A. Yes; that is the old Indian fisheries. There was one big fishing ground.

Cross-examination by Mr. MAYS:

Q. Do these four trails lead into Wisham?

A. Yes.

Q. Is there an Indian village there now?

A. At See-we-pam all of the houses are gone, but at Wisham they are not.

Q. Do these trails lead to Wisham?

A. Yes; down to the fishing grounds.

Q. Do they lead to the Indian village there now?

A. Yes.

129 Q. The man you got the net from, was he working for Winans?

A. He was stealing fish for himself to eat.

(Further question on direct examination).

By Mr. ROBERTSON:

Q. When and by whom were the houses at See-we-pam removed?

A. Seven years ago, by Whealdon.

Q. What was done with the houses?
A. They used that for fence to fence the land.
Q. When was this land first fenced in front of the See-we-pam fishery?
A. Whealdon put a little fence around first close to the trail; he fenced a little bit around and down to the river. The wire fence was put up about six years ago.
By Mr. ROBERTSON. That's all.
Mr. MAYS. That's all.

CHARLEY DICK, recalled for cross-examination, testified as follows:

By Mr. MAYS:

Q. Dick, I wish you would explain what the last witness testified about; what took place about his getting a net there, whose net it was and what time in the day it was, and all about it.
A. The net was a new one; one of Winans's hired men went to dinner and Winans allowed everybody, all of the Indians, while they were gone to dinner, to fish. When I come back at one o'clock Winnear was standing on the station, and Winans's hired man was waiting on him. I told Winnear to let the man go to work; he was working for wages. He would not do it, and I did not want to go any further, so I went and saw Winan and he told me to go down and tell him if he don't give up the net he will get the sheriff after him and take him up to Goldendale; and I went down and told him that, and he told me to go back and tell Mr. Winans to come down himself, and I went back again; the
130 third time he give up the net, threw it ashore.

Examination by Mr. ROBERTSON:

Q. Now, Charley, you heard the testimony of Winnear?
A. Yes, sir.
Q. Did he ever own a net?
A. I don't know; but he did not have his net at that time.
Q. How do you?
A. I was foreman there, and the men were at dinner. I helped to make the net, and changed the station back and forth.
Mr. ROBERTSON. That's all.
Mr. MAYS. That's all.

LOUIS SIMPSON, a witness called on behalf of plaintiffs, testified as follows, after having been first duly sworn.

Direct examination by Mr. ROBERTSON:

Q. State what you know about the Wisham fishery.
A. That is where I was born and raised, and I know that they have fenced it all up now. My father's fishing ground is at the place where Winan blasted to put in his big fish trap. Where the fishing ground was is where that wheel stands now. The fish go on the outside of the wheel except those that are caught in the wheel. Where the houses were it is all fenced up, and where the Indians dug the holes to put the salmon in the ground it is all plowed up by Winans, and they have the fishery all fenced up with a wire fence.
Q. How old were you at the treaty?
A. I was a grown man.

Q. What do you know about the accustomed place for the Indians to fish at that time on the Columbia?

A. That is the main fishing ground, Wisham and See-we-pam on the Columbia.

Q. How long has that been used as a fishing ground by the Indians?

131 A. My father fished all his lifetime when I was a boy there.

Q. Where were the principal points of fishing along the river, and are there any other points to fish than at the point at the head of the rapids between there and the big eddy?

A. Yes; that is all of the fishing ground.

Q. Where do you live now?

A. Here on the reservation.

Q. How long have you lived there?

A. About 16 years.

Q. Have you been to fish there on the Columbia every year?

A. Yes; that great fishing ground of my father, where he learned me how to fish, I used to go there and fish every season.

Q. When were you stopped fishing there?

A. 8 or 10 years ago by Whealdon.

Q. Did Winans ever*y* stop you?

A. Yes; Winans done worse; they fenced it all in.

Q. How many trails ran into the fishery at the time of the treaty?

A. Four.

Q. Were the trails the other Indians have described the four trails?

A. Yes, sir.

Q. Was there any other reason for traveling these trails other than go to the fishery?

A. That is all they traveled them for.

Q. Do the Indians on the Yakima Reservation still depend on salmon for their food.

A. Yes.

Q. Would these Indians fish there every year if not prevented?

A. Yes; they would go, and there would be lots of Indians go down there to fish.

132 Q. What effect does these fish wheels have on the Indians going down there to fish?

A. Their main—of course the wheel is getting the salmon and the nets can get a little, but the man don't want us to fish, and how can we get them. If they see an Indian catch a salmon, catch a fish, they will order them off. Now, you see the Indians used to have a good time, and eat lots of fish, but now their mouth is dry. I know the time of the treaty—you will never be cheated out of your fishing ground, and to-day we understand that yet. The Great Father give us that front part in the river to catch our salmon. He didn't put us away back in the mountains.

Q. Is there any other source of fish supply on the reservation or bordering on the reservation other than this particular point?

A. Yes; the treaty gave us that fishing point; no.

Q. Did the Indians continue to go there every year after the treaty, up until the time they were stopped by Whealdon and Winan.

A. Yes; but they can't get any more salmon. It is all fenced, and the white man won't let the Indians get inside the fence.

Q. Were these trails you speak of well beaten and well traveled trails to the fishery?

A. Yes.

Q. Was that the fishery there that the Indians insisted on at the time of the treaty before they would sign the treaty.

A. Yes; See-we-pam and Wisham are together, and it belonged to me personally. My father was chief.

Q. Were all of the Indians going there every year, at the time of the treaty, to fish?

A. Yes; every year—every day, twenty going in and twenty coming back. That is the main food of the salmon. Makes a man look fresh and stout. The Indians that were raised there were fat. I am a fat looking man myself. I eat salmon and berries. That is what the treaty gave me.

133 Cross-examination by Mr. MAYS:

Q. How many cattle have you?

A. I lost all my cattle. I had some. Got out of hay and my cattle di'd. I had about 25.

Q. Don't they catch salmon down here on the Toppensih on the reservation?

A. There are no salmon there. They don't catch any; never catch any.

Q. Arn't there lots of salmon in the Toppensih?

A. No, sir.

Mr. MAYS. That's all.

Mr. ROBERTSON. That's all.

White Salmon Charley, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Charley Ike sworn as interpreter.

Direct examination by Mr. ROBERTSON:

Q. How old are you?

A. 93.

Q. How old were you when the treaty was made?

A. I was a very big man then.

Q. Did you meet Gov. Stevens and Gen. Palmer?

A. I meet Palmer and Gov. Stevens at The Dalles.

Q. Do you remember what, if anything, was said about the Columbia River fisheries there at the time the treaty was made?

A. I was the man interpreting at the time they were holding the treaty. They mentioned the salmon, ducks, and animals, and deer, and roots. Gen. Palmer said the Government ain't wanting to buy what you are using for your life. Gov. Stevens said the Government only wants to buy the land and the timber. What the Indians was ready
134 to sell was the land and timber. The Indians got salmon and the deer and the roots and the berries and the grounds for horses. What I mentioned there—See-we-pam and Wisham—were the fisheries the Indians were to keep forever, where the Indians were then catching

salmon. Yes, sir; they were the fisheries that were mentioned by the treaty. Gov. Stevens and Gen. Palmer were up there, and the Indians pointed to the fishing stations and the houses, and Gov. Stevens and Gen. Palmer said they were theirs. The salmon station was mentioned to Gen. Palmer and Gov. Stevens where Winans' wheels are now standing. Another salmon station which they showed to Gen. Palmer and Gov. Stevens was where Winans' wheel now below See-we-pam stands just above the eddy. Another salmon station they used to call Koot-ch-mall-it (holding nets still; stillfishing). There in that place the Indians were always stillfishing there, and now the Winans fish there with a net.

Q. Is that on the point where the scow wheel is?

A. No; below Bill Charley's house. Right straight from Winans' house to the river is where the stillfishing place is. Another that was showed was Kaw-Path (meaning hollow rock) that was a main salmon station, too, which the Winans blasted out—there where the fish wheel stands now. The Indians thought this to be the boss of the salmon stations. From that which the salmon station *station* was showed to the Government and now——

Q. How long have you lived on the reservation?

A. Six years.

Q. Have you ever been ordered off of these fishing grounds by anybody?

A. I never was driven away by no white man, but I heard there was some Indian drove off from catching, but I seen myself it was all fenced in and all the wheels were put in the salmon stations and for that reason I never go any more.

135 Q. Do you still wish to go there to catch fish?

A. Always wishing, trying to go fishing, but I can't.

Q. Why?

A. I am afraid. One time I went down; I got there and the Indians told me not to go inside the fence, and the children used to crawl outside of the fence for water and tear their clothes. That is the way Winans are stopping the Indians from getting in.

Q. Is there any water there to water the horses outside of the water in the river?

A. There is an open place above Wisham for horses to water, and another place, Wah-wah-ha, where the horses water.

Q. How many Indians used to go down every year to catch fish?

A. Yes, sir, my friend. I would not count the Indians to you, but all the Indians used to go down during the salmon season. The old Indians at that time they used to catch probably in one day, and if it was a good day used to catch 1,500 salmon in a day. And that fish they used to divide with the Indians and used to eat it and had plenty of greace on them, and to-day they are poor, and to-day and on from that time to the Winans come there the Indians go there and have to buy fish.

Cross-examination by Mr. MAYS:

Q. Were any other fisheries named at the time of the treaty besides what you have spoken about?

A. There was some more salmon station that was mentioned at that time that they called Colwash salmon station above.

Q. Any more named besides that?

A. If other fisheries were mentioned, it was by other tribes.
Q. What is the Colwash fishery?
A. He says it was represented by Colwash at the treaty he was the head chief. At that time when the treaty was made Colwash was
136 living there at Wisham.
Mr. MAYS. That's all.
Mr. ROBERTSON. That's all.

WAH-ME-NASHET, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. How old are you?
A. 70 years.
Q. Were you present when the treaty was made between Governor Stevens and the Indians?
A. I was at that time living at White Salmon.
Q. How long have you been familiar with the fishery on the Columbia, where Winans' fish wheels now are.
A. I was born and raised there.
Q. Tell all you know about that fishery.
A. I know the fisheries. One salmon station is named , that is where the Winan wheel is now standing. Another salmon station used to be called , that is where Winans's other wheel is; and another, , that is where another wheel is. Another, named Wag-ne-wash, that is where there is another wheel. They were blasting out another large salmon station at Wah-ne-wash. They have another scow wheel. That is all the wheels they got. The Indians are not getting fish like they used to. The Winans always tell the Indians don't come any more inside of my land to catch fish. The Indians never catch fish any more.
Q. Do you want to go and catch fish?
A. Always go fishing.
Q. How many Indians went there each year to fish about the time of the treaty?
137 A. Before the treaty lots of Indians used to go from different parts to fish at that time. After the treaty they used to go, but in short time—they don't go so many now. At the time when Winans put the wheels there.
Q. Tell what you know about there being any trails there when the treaty was made?
A. I know there were four trails. One trail coming from Rock Creek down to the river, one trail goes from Somcoe, one from White Salmon coming up, one trail to huckle berries—four.
Q. Where were the principal Indian settlements at the time of the treaty?
A. One Wisham, one See-we-pan.
Q. How long did those buildings continue to stand there?
A. Whealdon tore down my houses. Whealdon tore down eleven houses. Whealdon said if you Indians don't remove from here I will put you on the island, and the Wisham told me you better leave from there.

So I went away at that time he tore down the houses. Some the poles I took, and Whealdon took most of them.

Q. How many years ago?

A. About eight years ago.

Q. Were any of these buildings that were torn down enclosed with Indian fences?

A. No (chow).

Q. Did he fish there every year all his life (witness)?

A. I used to fish from a boy.

Q. When did you stop fishing there?

A. Five years.

Q. What made you stop?

A. They told me to quit fishing—Whealdon told me to stop. Whealdon told me about eight years ago.

Mr. ROBERTSON. That's all.

Mr. MAYS. That's all.

138 CHARLEY COLWASH, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Where were you born?

A. Wisham fishery.

Q. Was your father the chief, that lived there at the fishery?

A. Yes, sir.

Q. Where was his house?

A. Bill Charley is using some of my father's timber now.

Q. What do you know about the fishery?

A. Where my father's fishing grounds. I used to go there until six years ago when Winans put up the wheel.

Q. Can they catch any fish when the fish wheels are there, enough to pay them to go from the reservation to fish?

A. No; the wheels catches it all. Of coarse we are very hungry now. When I go down there I can't get any salmon.

Q. Is that the place that all the Indians used to go to fish up until the time it was fenced?

A. Yes.

Q. Did the Winans ever order you off?

A. No; I am afraid of him, I never try, I go and buy fish from him. At all the dipping places Winans have nets there. He has wheels and set nets there. If a man knows how to fish salmon with a dip net he hires that man and dips them up. When I used to see I used to go with a spear and spear them when the water was so low the wheel would not turn, and when the water was low Winans would set their wheel down.

Q. Do you live on the reservation now?

A. Yes.

Q. Would you go down there each year and catch fish if the Winans did not prevent him?

139 A. Yes.

CHARLES WANNASAY, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Do you know anything about the Winans Brothers putting in any fish wheels there at the fishery?

A. About six years ago I worked there. I helped put up the fish wheel in front of Winans house.

Q. Did the Indians object to the fish wheel being put in there?

A. Yes; they objected to putting up the fish wheel there.

Cross-examination by Mr. MAYS:

Q. Are you a Yakima Indian?

A. I am a Yakima.

Q. You have been acting as interpreter for most of the witnesses, have you not?

A. Yes, sir.

Mr. MAYS. That's all.

Mr. ROBERTSON. That's all.

CHARLEY IKE, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Charley, what do you know about the fisheries on the Columbia?

A. I was raised there. I used to fish where the Winans have their wheel now, at the lower part eddy, and one time, about seven years ago, when Whealdon and his partner drove us away, we were fishing
140 at that time there. Whealdon come himself there and he drove us away. Finally we went again, and he took the net away from us and broke one of the net poles, and said that the Indians had no right to fish any more. I answered them, Why? He said, we bought this fishing place and the land from the Government. The Indian has the right now to live in the reservation. I said I don't think so. He ordered us away. After that we never went down there any more. At that time Indians used to go probably four or five hundred whole summer. After that Indians never went any more to fishing, because the fishery was all occupied by the whites, and after that a few Indians used to come down to fish at Wishams, but when Winans fenced, or put the fence pretty near to the Wisham settlement—that is, in about six years ago—the Indians never go any more in any great number. Indians always wishing to go down now. If there were no fence or wheels we would been there now like we used to be there fishing.

Q. Do you know of Wimans ordering any Indians off?

A. No, sir. Only I know from last summer—last spring—last year. I went over there myself; I seen Winan Brothers; I said you have no right to blast rocks at salmon stations. They said the Indians had no right to claim any more a fishery. If the Indians want to make a fight, get them lawyers in Yakima and we will have all the Indians drove into the reservation. That is what they said last year to me.

Q. What effect do these fish wheels have on the Indians catching salmon by nets and the other ways they used to catch them?

A. They catch all the fish. Stops them from going up stream. The salmon don't come up here any more to spawn. If there was not them wheels put there we would have fish in these creeks.

Cross-examination by Mr. MAYS:

141 Q. Have you told all that Whealdon did when you say he drove you away?

A. Yes, sir.

Q. Were you the other interpreter who has been acting in this case?

A. Yes, sir.

Mr. MAYS. That's all.

Mr. ROBERTSON. That's all.

LANCASTER SPENCER, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Lancaster Spencer, an Indian, testified in English.

Q. Mr. Spencer, how old are you?

A. 39 years.

Q. You were raised where?

A. I was raised on the Columbia.

Q. How old were you when you removed to the reservation?

A. I was about nine years old when I went to school.

Q. Up to six years ago, when Winan built his wheels on the Columbia, about how many families each year went down to the Columbia each year to catch fish?

A. Since I heard—we used to go about over a hundred families.

Q. About how many fish did each family bring back?

A. I know what we used to bring—four packs of dried salmon to one load; there would be between eight and ten pack horses for the winter's supply of each family. We had three or four different ways to cook it. One way they had to dry the salmon on poles, the other had to cook it by the sun until it got soft and mash it and put it in bags, which will weigh about 100 pounds. We mostly used to have six or seven packs for the winter's supply.

142 Q. What trail did they used to go to the fishery?

A. From between Goldendale and The Dalles road right straight down the hill. This trail they used to use nothing but horses, and another trail if they go by the wagon, go around pretty near from The Dalles; go around the hill.

Q. After they got around the hill it was the same trail from the reservation?

A. That was the wagon road to go around the hill.

Q. Is that the only fishing ground where Winans' wheels are—that was the accustomed place of the Indians to fish?

A. That was the only accustomed place since I have been a little boy. Between Wisham and See-we-pam were the only fishing places.

Q. Did ever any of the reservation Indians ever fish at the We-natchee-pam fishery?

A. The Yakima Indian Reservation Indians never used it.

Q. Are you satisfied that if this fishery was opened there to the Indians to fish that any considerable number of them would go down there every year to fish?

A. Yes; I know they would go over a hundred every year.

Q. Do the Indians depend upon fish as a source of supply for food?

A. That is the only food they used to use—everybody, all the Indians.

Q. Is there any supply of food fishes for general consumption in any of the reservation streams?

A. No.

Q. Spencer, can you describe the general character of the water between Wisham and See-we-pam, with reference to its velocity and what makes it a good fishing place?

A. Where the salmon runs they have a regular place to run, and when the water gets low they won't run in the same place. Some fish-
143 ing points are good at one stage of the water for fish, and some at another. Some fishing points they have five places for the fish to run.

Q. How do these fish wheels effect the fishing by net?

A. The wheel catches all the fish that are coming, and a net could not catch them. Takes most all the fish that are coming; the wheel has to take them.

Cross-examination by Mr. MAYS:

Q. Which catches most, the higher or lower wheels on the bank?

A. Since the first wheel was built; that is when they caught most. I could not tell; I have not been there since they built their wheel.

Mr. MAYS. That's all?

Mr. ROBERTSON. That's all.

Examination closed.

At this stage of the proceedings the taking of testimony was continued, to be resumed at The Dalles, Oregon, by consent, at a date hereafter to be fixed, it being stipulated by the respective counsel before the examiner that The Dalles, Oregon, be fixed as the place of taking the testimony of the plaintiffs and defendants.

Dated this 7th day of May, 1897.

144 The taking of testimony resumed, pursuant to adjournment, at The Dalles, Oregon, on the 19th day of May, A. D. 1897, before S. C. Henton, special examiner.

Present:

F. C. Robertson, assistant district attorney for Washington, for plaintiffs.

F. P. Mays, attorney for defendants.

Charles Wannasay sworn as interpreter.

SAM TAN-A-WASHA, a witness sworn on behalf of plaintiffs, testified as follows through interpreter:

Direct examination by F. C. ROBERTSON:

Q. Where do you live?

A. Up here where the salmon are.

Q. Have you ever fished at the Wisham fishery?

A. Yes, sir.
Q. Can you fish there now?
A. No.
Q. Why?
A. Answer I am afraid.
Q. Afraid of whom?
A. These men there. [Witness points to defendants.]
Q. Did they stop you fishing there; and when, and under what circumstances?
A. It was pretty near a year ago when they stopped me there from fishing.
Q. A year ago now?
A. I was fishing there last year, and then they came and told me not fish there any more, and from then, last year, ever since that I didn't fish any more.
Q. Did they do anything besides tell you not to fish?
A. That man came to me and he told me not to fish any more. If you don't stop fishing I will take you to law and fine you $50; that's what he told me. I had my net there and some brush that I stand on.
145 He took that and tore that down and throwed it in the river. They hired one Indian to watch there at the fishery. That Indian had a fight with me when I went and tried to fish. Ever since that, of course, I am afaid to fish.
Q. Describe this place you made to stand on.
A. It is kind of a stand they have—the Indians make for fishing there—a stand where they dip.
Q. Where is this fishing place?
A. Right between—right on the fishing ground; it runs along—it is right about the middle.
Q. Between what two fishing places?
A. Wisham.
Q. What other place?
A. Little further down is Se-we-pam.
Q. Then that place was between Se-we-pam and Wisham?
A. Yes.
Q. On the Washington side of the river?
A. Yes.
Q. How many years have you been fishing there?
A. I have been there—I was a boy and growed there; fished all the time.
Q. Are you a Yakima Indian?
A. My mother is a Wisham; I am right there at Wisham.
Q. Do you know the number of Indians that used to go there each year to fish?
A. All the time; they come in since then to fish. I think if they were all counted, a thousand Indians come there each year to fish.
Q. State whether or not that fishing place is now enclosed.
A. It is all enclosed.
Q. By whose fence?
A. Two men there—Winans Brothers.
Q. When were the Indians generally stopped from fishing there first?

A. When they go up to the mountains about August when they stop fishing.

Q. I don't mean what time each year. When were they stopped from fishing there?

146 A. That's last year.

Q. Were any of them stopped before that time?

A. No; they sometimes forbid Indians to fish; didn't have any fences.

Q. Last year was the first time it was fenced in?

A. Yes, sir.

Q. When was that fence built?

A. I couldn't tell you the month; they shut off the wheel right after they put up the fence last year—when they first shut down the wheel.

Q. Who built that fence?

A. Lee Winans and three other hired men, and one of his brothers.

Q. How much of a fishing ground did their fence enclose?

A. It fenced all of the fishery that was there—all the rock—I can't tell; I don't know the distance; I think it is a mile and a half or two miles all through.

Q. Leaving out the place that is fenced, is there any other fishing ground for Indians to catch fish in?

A. No.

Q. Did these Indians continue to go up until the time they were stopped by Winans Brother?

A. Yes; all the Indians says he can't get any more salmon there. It is all fenced now at that fishery.

Q. Did they continue to go until that fence was put up there?

A. Yes, sir.

Q. How many fish during the fishing season, with an ordinary net, could one Indian take?

A. Long time ago they catch about pretty near one hundred in a day.

Q. Could they catch that there now if it was not for the fish wheels?

A. I fish all day this time not catch a salmon.

Q. If the fish wheels were not there would the fish be caught as they used to be in the same numbers?

A. Two years when the fish wheel washed away we caught lots of salmon; all the Indians caught lots of salmon.

Q. Why is it that these fish wheels catch the salmon?

A. The wheel stands right at this channel. There is no other

147 place salmon can go; they have to take that place.

Q. Are these wheels at the place where the Indians used to stand to catch fish?

A. That was a big fishery called Se-we-pam, where one of the wheels is right now.

Q. How many Indians could fish along the place where these wheels are at the same time or where each of these wheels are?

A. Twenty men fished on one fishing ground during the day where the fish wheel is now.

Q. Can twenty men fish at each of the places where the fish wheels are?

A. When there was lots of Indians they come in one fishing ground—three, four, five, or six men all fished on one fishing ground.

Q. Have Winan Brothers been having anybody fish with nets since the wheels have been up—at the same time?

A. No; when the wheel washed away then they hired men to fish with the nets.

Q. How many men did Winan Brothers have fishing when the fish wheels washed away?

A. Over ten.

Cross-examination by Mr. MAYS:

Q. Did you work for Winan Brothers in '94?

A. Yes, sir; I worked for Winan Brothers.

Q. Why didn't you work for yourself instead of Winan Brothers?

A. I was fishing for Winan Brothers.

Q. Is that all the reason you worked for Winan Brothers and didn't fish for yourself?

A. These men that had a contract for Mr. Winan told me to fish for Winan Brothers.

Q. Wasn't it three years ago you where talking about instead of two years ago?

A. Winan knows the year when I fished for him.

Q. When was the last year you fished there?

148 A. One year.

Q. When you did fish there did you sell fish to any white people?

A. No.

Q. Did you sell fish any time to any of the cannery men?

A. It is a long time since they used to sell to canneries—it is three years over since they quit selling to cannery.

Q. Haven't they sold any to cannery men since?

A. No; myself I say I never sell any more. I can't hardly catch enough for my own use.

Q. To whom do you sell?

A. I didn't sell to anyone.

Q. What cannery, when you did sell?

A. To Suferts'.

Q. When was that?

A. Three or four years ago.

Q. Did a good many of the Indians sell to the cannery men?

A. At that time they sell, I think now they don't sell any.

Q. When the Indians quit fishing there, was there anything like as many Indians coming to the fishery as there was a good many years ago?

A. They haven't come in much—about five years since they didn't come as many.

Q. Suppose the wheels were there and the fences wasn't there, couldn't you fish anyway?

A. Of course. Now—if the wheels wasn't there or the fences—the way it is now there is notices all along on the fences.

Q. What I want to get at is, if it was not for the fences couldn't you go there and fish?

A. I could go and try and fish, of course, if the fences wasn't there.

Q. Isn't there plenty of room outside to fish if the fences wasn't there to prevent you going to the fishery?

A. I don't think so.

149 Q. Do the wheels cover all the fishing places where you catch fish?

A. I know, but then all the fishing ground that is outside the wheel is all fenced.

Q. Do you know the fishery called Skin?

A. That is another tribe's fishing ground.

Q. Isn't there a good fishery there?

A. It is a fishing ground there that belongs to another tribe of Indians.

Q. Couldn't you go there and fish?

A. No, I can't fish there; the Indians won't allow me. I couldn't go there.

Q. Are not the Indians that do fish there part of the Yakima Nation?

A. They used to go—some that have relatives there—go there to Skin. At Wisham there is more salmon.

Q. How far is Skin above Wisham?

A. It is about four miles; maybe three miles.

Q. Is Skin on that same side of the river that Wisham is?

A. Yes, sir.

Q. Are there any fish wheels at Skin?

A. It is lots of fish wheels there, and lots of fence there, and lots of fish nets there.

Q. Are there any fish wheels at Skin at all?

A. There is one; right there at Skin is one wheel.

Q. Whose is it?

A. Suferts.

Q. Isn't that on the Oregon side of the river?

A. No; it is on the other side of the river.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

JOE KO-LOCK-EN, a witness sworn on behalf of plaintiffs, testified as follows through interpreter:

Direct examination by Mr. ROBERTSON:

150 Q. Are you a Yakima Indian?

A. No, sir; I live here across the river.

Q. Have you lived here all your life?

A. Yes, sir; born here.

Q. Do you know whether Wisham and Se-we-pam fisheries are?

A. I know where the fisheries are.

Q. Where are they from The Dalles; what direction?

A. That way from here, from The Dalles. [Points north of east.]

Q. How many miles?

A. I couldn't tell the distance in miles.

Q. How long have you known these fishing places?

A. When I first was a little boy; as far as I could recollect I seen that fishing ground.

Q. Did the Indians fish there at the time you were a little boy?
A. I seen my father when I was a little boy fishing there all the time.
Q. How many Indians each year used to come and fish there?
A. I can't count exactly; good many Indians used to come there.
Q. What did they do with the fish they caught?
A. They used to cut salmon, dry them, and sometimes make it fine; put them up in sacks.
Q. Where did these Indians come from?
A. From the Yakima, Simcoe, White Salmon, and from all other parts.
Q. Are these Indians still fishing there?
A. No; I don't see them any more.
Q. What is the cause of their not fishing there?
A. When these two men come there, Winans, the Indians get poor; hard times.
Q. Did the Winan brothers stop them?
A. They come there and they throw all that stand, fishing ground—throw that all out.
Q. Go on.
Then at their place where the camping grounds were, they fence that all up; there are no camping grounds there now for the Indians.
151 Q. Explain where that camping ground was.
A. That place called Se-we-pam.
Q. How many houses were there?
A. There were about ten long houses for drying salmon.
Q. When were those houses taken down?
A. O. D. Taylor tore all the houses down.
Q. How long ago?
A. It was a good many years ago; I can't remember how many years exactly.
Q. Did anybody prevent you from fishing there?
A. Then there was no stands to fish, but I tried dipping in every little rock I come to; tried to find and see if I could make any stands from the last year; I never go in the river any more to fish there; when Winan Brothers put the fences they forbid me to go inside in the river; I went one time and tried to fish there; seen their men go in there. They told me: "You get right out of here; don't want you here." They told me if you don't listen at me we will get you and lock you up, according to law; from that day, of course, I quit and went into my house; I staid two days in my house; sheriff come there and arrested me then; they took me to the court because I fished there on that ground. Then, ever since that time, I am afraid because they forbid me going into the river any more.
Q. What did they do with you when they took you in court?
A. They took us there and we hired one lawyer there; then they took me in court, and then they told me after the court is closed—they told me you have no more rights to go there to fish.
Q. How long ago was that?
A. Last year.
Q. What effect would the fish wheels have on the river there, with reference to catching fish with nets, if the fences was not there?

A. We would be trying to fish, of course, there; if the wheels were not there we would be trying. The wheels catch all the salmon—most all the salmon that come there.

Q. How many tons per day in the fishing season do the fish wheels catch?

A. I can't state you the tons; I couldn't figure. I don't know
152 the weight or anything; I see big pile salmon in a day.

Q. How big?

A. About as far as that man. About that high from the ground. [Witness indicates about twelve feet, and about two and a half feet high.]

Q. How many fish in a day can an Indian catch with a net?

A. Long time ago they catch pretty near a thousand.

Q. How many did they catch before the fish wheels went out?

A. I told you how many they catch before the fish wheels; about that much.

Q. Do you depend on salmon for one of your articles of food?

A. Yes; I depend on it because my father growed with salmon; he had nothing else but salmon, and my father's people; the same Indians eat salmon—nothing but salmon.

Q. Did the Indians continue to depend upon the salmon they catch for their food?

A. All the time they used to eat fish, and they still want to eat fish all the time. If they don't get to eat any fish they feel bad about it.

Cross-examination by Mr. MAYS:

Q. At the time the treaty was made, did the Indians do any fishing?

A. Up there they used to have little pieces of garden.

Q. Who?

A. Con-a-wash, Col-wash, and other Indians.

Q. About how many had farms?

A. There was a good many then at that time; I don't recollect; I was very young at that time—a boy.

Q. Did they have farms anywhere else—only on the river?

A. Yes; there was some there and here also. (The Dalles.)

Q. Where?

A. There above Wisham, and there and below Se-we-paum.

Q. How did they farm?

A. They make these gardens; they didn't raise any wheat or anything of that kind.

153 Q. Do they now?

A. It is all taken, now, and fenced.

Q. I mean other places where the Indians have farms.

A. I never go that way myself; I am all the time here in this place.

Q. What do you mean by that way?

A. I never go out to their place. I am here all the time.

Q. Have you ever been on the Simcoe Reservation?

A. Never.

Q. Have you ever been there in your life?

A. I used to go a long time ago.

Q. You belong to the Yakima tribe, or nation, of Indians?

A. Yes; I used to go there.

Q. I am asking you if you belong to the Yakima tribe, or nation, of Indians?
A. I don't belong. I am not a Yakima.
Q. What are you?
A. Wisham.
Q. Don't you know that most of the Indians farm on the reservation?
A. I heard.
Q. Have the Indians got cattle and stock?
A. I hear they got cattle, horses, and one thing another. I never seen them myself.
Q. Have they a flouring mill over there?
A. I never seen it; I heard they had.
Q. Have you a farm?
A. I got a place. I take up a small piece.
Q. Where?
A. Up there.
Q. How much?
A. Eighty acres.
Q. What do you do with it?
A. I never done anything there.
Q. How long have you had it?
A. About ten years now.
Q. How have you lived this last year without salmon?
154 A. I bought some provisions here—flour and one thing another—in this town.
Q. Did you eat that before this last year or two?
A. Last year I had some salmon.
Q. Are they catching any fish up there now?
A. No.
Q. Is the water too high or too low?
A. It is pretty high water now; everything pretty near under.
Q. How long do the fishing season last?
A. Now; it commences from now, if the water was just right in the rocks up there. (Question read.) They fish all the time until the river gets very low; when they can't catch any more then they quit; three good long months' fishing—three months that is good fishing. They fish, and when the water gets very low they quit.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

CHARLEY CATH-LUM-IT, a witness produced on behalf of plaintiffs, testified as follows, through interpreter:

Direct examination by Mr. ROBERTSON:

Q. Where do you live?
A. Wisham.
Q. How long have you lived there?
A. I was born there.
Q. How old are you?
A. I don't know how many years; I can't tell my age. When Whitman died in Walla Walla I was a boy. I remember all that.

Q. Were you living here when the treaty was made with Governor Stevens and General Palmer?

A. I was at Wisham.

155 Q. Lived there?

A. Yes, sir; that is where I lived.

Q. Did the Indians used to go there to fish then?

A. They used to go there to get salmon.

Q. Do you still at that place?

A. No.

Q. Why?

A. When Winans come there to that place—when Winans come there, he go to that fishery and blast all them rocks where the stands were—the fishing grounds. I went and tried to stop him, and told him, "don't do that." He didn't want to listen at me; he blast all them rocks where the fishing grounds was and the stand; from that time I never could catch fish anywhere; all the people then they can't catch any more fish.

Q. Did the Winan brothers ever prevent you from going there to fish?

A. I went and fished; when I was fishing I heard somebody holler at me; I seen Winan standing up; he told me, "get out;" I lay my net down and went there; I got there to Winans; Winan told me to stop and quit fishing. "You do wrong when you get salmon right here in this water; I will take you over to Goldendale to law." That is what Winan told me. Then I was afraid, of course. That is what I know.

Q. When was that?

A. Last year.

Q. What was Winan's manner towards you at that time?

A. He was very angry; he was talking loud. He told me stop, "I don't want you there to get any more salmon;" and last month—that is the time I commenced to fish—I was expecting to do so—I come to Winan's house. I didn't have any chance to talk to him, and he asked me who was there to the water yesterday; I told him I didn't know who it was; he told me, "don't you go there any more—down to the water; I don't want you to go there and fish; if you do that I will catch you; I will take you to law." That is what Winan told me. "If you go to your house tell the other Indians this way." Of course I got scared

156 and went to my house; I got there and told the other Indians this what Winan said; ever since that time the Indians are scared; they have not caught any salmon. That is what I know.

Q. Is there any other good fishing place, not enclosed, where the Indians can go to the Columbia River and catch fish?

A. Right there at Winan's fish ground.

Q. I ask you if there was any place outside of the fence?

A. No.

Q. Did the Indians used to come or continue to come from the Yakima Reservation, up until the time they were stopped from coming there?

A. They used to come all the time; now they have no use of the water; they never come any more.

Q. Where do you live?

A. Wisham.

Q. Is you name Bill Charley?

A. Charley Kath-lum-it.

Q. Do you know Tom-Se-wit Charley and Little Bill Charley?
A. Yes; I know them.
Q. How far do you live from them?
A. Not far; right close.
Q. How far?
A. Little farther; about sixty yards.
Q. Is it fenced in, right in front of the land that Bill Charley lives on—between the land Bill Charley lives on and the river?
A. Right alongside of the house; it is all shut up.
Q. Who shut it up?
A. Winans.
Q. How many fish a day did you catch with a net there before the fish wheels was put in?
A. Good many in one day.
Q. How many?
A. Lots of salmon; I can't tell; big pile.
157 Q. One hundred?
A. Yes.

Cross-examination by Mr. MAYS:

Q. A thousand?
A. I am telling the truth; I am not telling anything out of the way; I tell it is a big pile salmon.
Q. How do you know it is one hundred if you can't count?
A. I can count, still I can't count right on the jump off.
Q. Did you catch the same amount every day?
A. Yes; all the time.
Q. Isn't it a fact, now, some days catch a good many, some none, hardly any?
A. If the water raises it would be less; if the water goes down, then plenty all the time.
Q. Isn't there a fishery at Salido, on the Washington side, called Skin?
A. Yes; away up there.
Q. How many miles above?
A. I don't know anything about miles.
Q. This side Salido, isn't it?
A. Yes.
Q. That is one of the old fishing places?
A. Yes, sir; that is the Skin fishing ground.
Q. That is an old Indian village, and there yet, isn't it?
A. Yes, sir.
Q. Same kind of a one there is at Wisham yet, isn't there?
A. Yes; that is the kind there is at Wisham.
Q. Do you fish the same place every day?
A. Skin is another place, of course, you are talking about. [Question read.] We fish follow up the water; if the water comes up we keep coming up, but if it goes down we keep going down.
Q. Then the fishing places changes pretty near every day, doesn't it?
158 A. If that fish ground gets covered up we go to another one.
Q. Then you move the fishing place?

A. Yes; move here and there and there.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

BILL SE-HI-AM, a witness called on behalf of plaintiffs, being duly sworn, testified as follows, through interpreter:

Direct examination by Mr. ROBERTSON:

Q. William, how old are you?
A. Good many years.
Q. (Question repeated.)
A. There was no white men here when I was a little boy, at that time. I was a big man when the white men come here, and they, of course, my old people they eat salmon; they are all gone; then I come myself, and some other younger people come; myself at that time the fish kept me alive; that is what raised me.
Q. Where were you living when the treaty was made between Governor Stevens, General Palmer, and the Indians?
A. I was here myself.
Q. Do you know where the Wisham fishery is?
A. Right there, I know [pointing up the river].
Q. How far do you live from the Wisham fishery?
A. I am right there at Wisham.
Q. Have you lived there all your life?
A. Yes, sir; I am getting old now, right there at Wisham.
Q. When was that place first fenced in?
A. Last year.
Q. Was any of the fishery fenced in before last year?
A. Wisham, or Se-we-paum—they fenced first in Se-we-paum, then go up and fence up again.
159 Q. When was Se-wepaum fenced in?
A. About two years ago; last year the other part.
Q. Do you remember anything about the treaty?
A. They told me the place so much for the Indians' use as long as the fish run in the river, that ground shall belong to them; no man, no white man, can go in there; he was just to take place to farm out from the river.
Q. Where was that statement made?
A. They is all dead that make that law, the Indians that agreed with the white ones.
Q. You were living then?
A. Yes; I was there. That is what I heard the old people said.
Q. Did you know the principal fishery at the time of the treaty in '54 or '55 of the Indians?
A. That is Wisham and Se-we-paum.
Q. Are those the principal points the Indians went to fish?
A. Yes; when they agreed; that rock it was a fishing ground for the Indians.
Q. Are you familiar with the Columbia River in general?
(Question read.)
Yes; I am familiar with it.

Q. Is there any other place of the Columbia River that there is the same opportunities for the Indians to catch fish with nets, spears, and other primitive appliances?

A. Some fish with nets and spears, and all day.

(Question read.)

No other place; no people catch fish anywhere else.

Q. Were the white men in the habit of going to these fisheries and fishing with nets before Winans and others put up the fish wheel there?

A. No; only Indians.

Q. Did any white men ever go there?

A. They come and take away salmon; the Indians gave it to them.

Q. Were you at any time prevented from fishing at Wisham or Se-we-paum?

A. Last year I got scared; I thought I was going to die; didn't
160 have anything to eat; I thought I was going to catch some fish; I went down early in the morning and fished; I got three salmon and one small one; I went ashore; I went and told my wife, I get salmon now; I went and see a man standing where my salmon were; I got there he told me, "What you want?" I told him I come after my salmon, and he told me, "Don't you touch that salmon now; I don't want you to take that salmon." Of course, I got scared; I seen my wife coming; she had a bucket in her hand, come after water; I jumped down and didn't listen to this man; I put all the salmon in the sack; this man asked her, "What you come for old woman?"

Q. Which man?

A. Winans; of course, I didn't want to stay there; I take this salmon right home, and of course ever since that I could never get any more salmon; I am afraid of them men; that is the reason that I have not got any salmon now.

Q. What has been your principal article of food since you were a boy?

A. That is what raised me.

(Question read.)

My mother used to give it me.

(Question read.)

Yes, sir; that was all my father and mother——

(Question read.)

Yes, sir; I have got no salmon now.

(Question read.)

Salmon.

Q. How many Indians used to come to catch salmon each year?

A. Good many; come from all parts.

Q. How did they take salmon home?

A. Horses to all parts.

Q. Do you know about how many used to come?

A. They come, I think all come to the fisheries, Wisham and Se-we-paum.

Q. Are all the fisheries, the Wisham and Se-we-paum, above and below, where the Indians used to catch fish, fenced in?

A. They got it all fenced in all places where this fishery is—just like wrapped up.

Q. Do the Indians still depend on fish?

A. They depend on fish, all; that is the reason the Indians like to go to fish?

Q. About how many Indians are there that live down there close to the Wisham?

A. Good many.

161 Q. How do you make your living now that you can not fish?

A. Get some roots; I am hungry. Salmon hungry.

Q. Do you still eat dry salmon?

A. My grandfather and other old people they always had dried salmon to eat.

Q. How many each year do you dry?

A. Good many.

Q. I want you to give some idea of how many fish you dried each year?

A. I used to catch myself about three hundred.

Q. Each year?

A. Every year a good many, and now I am dry and nothing to eat.

Q. How many Indians live at the same house you live at?

A. Good many.

Q. Show on your fingers how many.

A. Two and eight in one place; some other I can't tell; right there where I live; little below me is more Indians; all are sad; have nothing to eat.

Cross-examination by Mr. MAYS:

Q. Have you got a farm?

A. I have got no place; there is a place up there belonging to them.

Q. How long have they had it?

A. Put potatoes there.

Q. How long have they had it?

A. When the treaty some man give it——

Q. How long have they had that place?

A. Long time; when the Government give it to them.

Q. Do you farm it in any way?

A. They put some potatoes and other things.

Q. Any of them have farms at the time of the treaty?

A. No; not up there, but around here they did.

162 Q. What do you mean by around here?

A. The old men that had places here——

(Question read.)

Here witness, as his hearing was poor, was excused to be called later.

BILL CHARLEY, a witness called on behalf of plaintiffs, being duly sworn, testified as follows:

M. Martineau was sworn as interpreter for him.

Direct examination by Mr. ROBERTSON:

Q. Where do you live?

A. I live up at Wisham.

Q. How long have you lived there?

A. Since I can remember.

Q. Do you know anything about the fishery at that place?

A. I know all the fisheries.

Q. State all you know about the Indians fishing at that place, and anything else about it.

A. We have got good many——

(Mr. Robinson to interpreter. Tell him to go on and tell his story.)

Now our fisheries are all destroyed. The place we call Se-we-pam there is now a big wheel stands there—that is just the same as my mother and my father, and the rest of our people. That is the place my people, great grandfather and other relations depend on for their living; now this time all I can do stand there and look at place where my father and grandfather made their living off of; right where that fish wheel stands now there used to be as much as ten of our houses. This O. D. Taylor just the same as he took them and throwed them right out. All what we had there to dry salmon with; everything else has all been destroyed. Now, Mr. Winans has a garden spot there and raises vegetables of different kinds. Now, this time we can't get any fish there; my grandfather and my mother and father had made their living off that place and me too; now I can stand there and look at them catch the fish. When I was grown up to be a man my grandfather told me, and my father told me that is our fishery; this fishery is named Se-we-paum; now I am there I can just stand there and look at them; they have got this place all closed
163 in by fences, this place, Se-we-paum; now my name is Bill Charley, and this man that owns that fishery had me arrested. He has taken me to the law; now the law says, now you must not go around here any more, if you ever go there over my fence you will have to pay fifty dollars; if you have no money we will take you to Goldendale, then you will be fined, and from that day I am scared; I have never said a cross word to him. I am perfectly scared of him. That is the way he has been using me; now this is what myself and other of my tribe here are scared of him. Now the fishing season is commenced here, we are here and can't fish; now he is the only one, we see him going up and down all along the fishery seeing if there is not some one in sight. All the biggest fisheries that where there has got three wheels on; he has got everything all closed up; now he says I want this law to look after me [interpretation of interpreter, referring to witnesses him] and see if I can get me back my fishery. I was raised on that ground and fished around there; all of my relations and generations have been buried on that land, was raised around there; all along now we are very poor, haven't got nothing, and we can't get any fish; that is the way this man Winan has been using us; that is the way he has been doing to us. All that I want you to understand is, if there is any law to help us we would like to know. God knows that is the only thing we ever had depended on. In Washington they know—this wheel they have got there; I want you to see if you can't remove that wheel because we are starving for fish. There is where I have been raised, it is now my father's and my mother's land I am really belonging, and there is the land this day I come here to tell you. My friend, I have come to you for protection. When the treaty had been made the old people had said, we want this; this is our privilege, this fishing right, this place; we want this always to be laid out for us and my people to fish; that is where that wheel is to-day. We are going around there with tears in our eyes just looking at him. The law said when they made the treaty with them,

the white people, he said you shall be never disturbed in your rights; this is just the same as you or me, and that is the reason we always come there and stay there.

164 Q. Do you know anything about some land being set apart for yourself and your wife, Klickitat Charley?

A. There was nobody ever come there and told me only this agreement was made for the fishery and this land for them to camp on.

Q. Have you a boy, and what is his name?

A. My son's name is Bill.

Q. Have you a boy named Tom Se-wit Charley?

A. Yes, another one.

Q. How old is Tom Se-wit Charley?

A. Nineteen years old.

Q. Are you the Bill Charley whose name appears on this plat?

A. That is another fishery there.

Q. How was it this land here for your boy come to be fenced in?

A. O. D. Taylor fenced that in.

Q. Is that good land?

A. There is nothing but gravel and rocks.

Q. Is there any good land here?

A. Nothing but rocks.

Q. Is it any good for Indians to pasture their horses on?

A. Yes, in some places; in spots.

Q. Is it all fenced in between this land here, which appears as his land, and the river?

A. From the river, between that and the river, it is all fenced in.

Q. Where do you get your water to drink?

A. Half mile, just as near as I can tell, there on the other side.

Q. Before it was fenced it, did you get your water from the river?

A. Right next to the river is a spring.

Q. Can you get water there now?

165 A. The fence is there; I can't go there.

Q. How far is that spring from your house—the one that is fenced in?

A. I can't tell. It is very close.

Q. Is that in Winan's fence?

A. Yes, sir; Winan's fence.

Q. How long ago was it you were prevented from going to this spring?

A. Last year.

Q. Do Winan Brothers use that spring for anything?

A. Mr. Winan forbid me from going there and getting water.

Q. What did Winan Brothers use the spring for?

A. Their spring is away below from that.

Q. The one they use?

A. Yes, sir.

Q. About how many Indians each day used to get water from that spring?

A. In my memory, before now, there has been about a thousand people.

Q. All got water from that spring?

A. The only place they get at a spring where there was drinking water.

Q. Where did they camp?

A. Right back there where this land is. This land is just like two camping grounds.

Q. One at Wisham and Se-we-paum?

A. That is right.

Q. Do you know where Winan Brothers has their scow fish wheel?

A. Right there where we used to live—right in there.

Q. I mean the scow fish wheel?

A. Upper end of the fishery.

Q. Do you know where that big eddy is?

A. Just at the end of the fishery.

Q. Is there any other fisheries there than between the head of the rapids where the scow fish wheel is and the big eddy; if there is any other place besides that?

166 A. They fish no other place—only this place.

Q. Is there any other place suitable for net fishing you know of?

A. I don't know of any other place right there, where they have all the fences up.

Q. How many Indians each year used to come to the fishery there?

A. As much—I couldn't tell—as much as ten camps at Se-we-paum and just as much more at the other place.

Q. About how many men in a camp?

A. Se-we-paum, be as much as five hundred men.

Q. About how many fish a day do these men catch in the fishing season?

A. That place where that wheel is, where we used to catch there, about as much as one hundred a piece in a day.

Q. About how many men would fish there each day?

A. About fifty at a time.

Q. Do you know when these lands were fenced in along the fishery?

A. Must be about three years ago.

Q. Before these fences were erected, how many roads approached these fisheries and from what points?

A. There used to be two main roads that run to Se-we-paum, one to Wisham, and other small little trails.

Q. Are those roads still open?

A. Se-we-paum the road is half shut up.

Q. Can they get there at all?

A. We can't get any roads near to the fishery.

Q. Did these roads go right to the fishery?

A. These roads went to other camps there. You can see their tracks where they had trails in different directions.

Q. Are they all fenced in now?

A. All them roads are all shut up.

Q. How do you get to your place?

A. Ride right outside of the fence right along.

167 Q. Any trouble for you to get to your place?

A. The fence is right in front of them so they can't get to the fishery; they can go right along the fences.

Q. Does that fence run right along the bluffs of the river?

A. Now, some of the fence there the water has taken away; it runs right along the river.

Q. How many fish each year could you put up before you were prevented from fishing?

A. With a small dip net I catch as much as one hundred a day.

Q. Now how many would you put up for your use each year?

A. We would average over a thousand a piece.

Q. How many pack horses would each family going to the fishery take with them?

A. We have packed as much as one hundred horses.

Q. In a year?

A. In a year.

Q. Were there any Indians living on the land where these houses were standing when O. D. Taylor tore them down?

A. The houses were quite a distance from where the camping grounds were.

Q. Any Indians living there?

A. There was quite a good many there; there was one old lady there; they chased her out of her house.

Q. What was her name?

A. Wishpam.

Q. Had she lived there all her life?

A. She belonged to that tribe and they always lived there.

Q. Is she here?

A. Yes.

Q. Had the Indians always occupied that land up until the time these houses were torn down, where Winan's house now is?

A. Ever since I can remember; as far as away back they had always lived there.

168 Q. About when was these Indians run away, how many years?

A. There must have been ten camps there, and they drove them away.

Q. Who drove them away?

A. Mr. O. D. Taylor and other people.

Q. How long ago?

A. About eight years.

Q. What effect do these fish wheels have on fishing with nets along the fishery?

A. Because their fishing grounds are occupied.

Q. What effect do they have on catching the fish?

A. They are about cleaning out all the fish.

Mr. MAYS. Just state what he said.

(Interpreter.) He says those fish wheels are destroying all the fish.

Q. How do you know?

A. They catch all there is in the river.

Q. Are you familiar with the amount of fish these wheels catch in the fishing season?

A. I have no idea; they catch a good many.

Q. Approximately, how many in tons?

A. I have no idea how many tons, or how many; they are all in boxes; they haul them away with four-horse teams.

Q. Every day?
A. Sometimes I see them haul away three or four wagon loads.
Q. Four-horse teams?
A. As much as four wagons.
Q. How many days have you observed that?
A. Most every day.
Q. Unless prevented by the Winans here would the Indians still continue to fish at the fishery?
A. That is all we ever did depend on; we are all shut out from there.
Q. Did the Indians every year go there to fish, and did Indians always live where Winan's house now is up until the time these houses were torn down by Taylor?
169 A. At Se-we-paum and this other place is the only place they ever did live.
Q. Continued to live there until they were driven away?
A. Yes, sir.
Q. Did you see anybody try to fish with nets when the fish wheels were running, and above the fish wheels?
A. There is no other place.
Q. Do they try to fish there?
A. All of the fishing places—the real fishing places—had all been destroyed so that they can't use them; they would probably fish there half a day at a time; probably catch a salmon or two before Winans blasted the rocks there. The Indians could put in platforms like they used to have them and fish now and catch fish; that place there has all been destroyed.
Q. If Winans' fish wheels were not there now, and the Indians could go there and put down their platforms and fish for salmon, could they catch some?
A. They could catch some fish if the wheels were not there.
Q. If these wheels were not there, or the Indians were permitted to fish there now, could they catch enough fish to supply them as they used to be supplied with salmon?
A. They could make scaffolds there as they used to and catch the fish.
Q. Have you observed the number of fish that run up the river each year?
A. There are plenty goes up this river, salmon.
Q. Do you think the fish are as numerous now in the Columbia as they were twenty years ago?
A. The salmon is about pretty near exhausted.
Q. What is exhausting them?
A. Nets and fish wheels.

Cross-examination by Mr. MAYS:

Q. Have Winans any nets?
A. In the big eddy—there is some eddies there—Mr. Winans has nets.
170 Q. Has he any nets above any of the wheels?
A. Only below.
Q. Are there any nets between any of the wheels?
A. Only below the fish wheels and the eddy.
Q. What fish wheels and nets do you mean has destroyed the fish?

A. The nets will corral all the fish. When they set a net and take it up it will be full of fish.

Q. What fish wheels and nets have destroyed the fish?

A. The nets and the wheels; they are just about the same; the nets and the wheels; they destroy the fish just pretty near alike.

Q. Are there any other fish wheels or nets in the river besides Mr. Winans' anywhere?

A. Below the main fisheries there was quite a good many.

Q. Are there any on the opposite side of the river?

A. There are just about the same on this side of the river.

Q. Are there any above on either side of the river?

A. There are wheels on both sides of the river up there now.

Q. Are there many fish wheels and nets along down the river from the fishery at Wisham to the mouth of the Columbia River?

A. I have never counted them, or anything like that, but I know there are fish wheels and nets between here and the mouth of the Columbia River.

Q. Do you know where the fishery is called Skin?

A. I know.

Q. How far is that above Wisham?

A. That is quite a good ways, but that is another tribe of Indians.

Q. Did each Indian tribe have its different fisheries?

A. The Wisham tribe and Skin tribe, they use two languages.

Q. Did they have different fisheries?

A. We have different fisheries; we never go to each one's fisheries.

Q. Would you say this is the only fishery for your people; you mean this is the only one you claim belongs to your tribe, do you?

171 A. Our tribe named Wisham tribe, that is what we claim, the Wisham.

Q. Are there any fish being caught now over there by either the wheels or the Indians or anybody?

A. I do not know; I can't tell whether anybody is catching any or not. I am not catching any, or my tribe.

Q. If the fish wheels are not there could the Indians then fish?

A. These places that belong to us, I see fish just the same as I did.

Q. Could you get in there to fish?

A. I would go there, but I have no way of getting there.

Q. Is not the fence really what prevents Indians from going there to fish?

A. That place is all fenced in; I can't get in there nowheres.

Q. Then it is the fence that shuts the Indians out, and not the fish wheel, was it not?

A. The fish wheel is right in our way to stand, right on our main fishing ground.

Q. How could you get there as the fence remains?

A. We can not get to the river on account of the fence; we can not get to these fishing ground on account of the wheel.

Q. Do you fish on one spot?

A. That is our main fishing place; that is the only place we ever did fish.

Q. I don't mean the general locality; I mean do they fish on one spot all the time, or do they change places of fishing from day to day, as the river might cause them to change?

A. In the Wisham we fish when there is medium water; when it gets too high we all got to go to Se-we-paum.

(Question read.)

As the water goes up we got to move back and fish off of the highest rocks, highest points.

Q. Then at the point where the wheel is located, the place where the wheel is located at Se-we-paum, you wouldn't be able to fish there for any length of time, but would have to change as the water rose or fell?

172 A. We fish there each day; depends on how the water raises; we may fish there for a few days, maybe several days.

Q. Maybe only one day?

A. Well, about four or five days, as the water goes up.

Q. Can you fish there in the river, anywhere along between these fish wheels, except from the shore?

A. We fish on the rocks; on the main land sometimes.

Q. Can the Indians fish in the river in any way except on the shore?

A. We stand right on the rocks, right along the river bank.

Q. Suppose you were not allowed to stand on the rocks, could you fish in the river?

A. I have no other way of doing it.

Q. Is it possible for the Indians to fish in the river there, in any way except standing on the shore and doing it?

A. Sometimes we put out scaffolds, something like that. (Question read.) We have no other way; that is the only way we have of fishing.

Q. Why can't you fish from the river—fish in the river?

A. We have no other ways but spear and fish with the dip nets.

Q. Why don't they go out in the river and fish?

A. We have no other way but only these scaffolds for fishing.

Q. Why don't they fish there in the river without going on Winans land?

A. We have no other place to fish there, but right there.

Q. Why don't you take a boat and go out in the river and fish?

A. How can I go in that rough water?

Q. Is the water rough there?

A. It is the rapids, big rapids.

Q. Can't you use a boat in the stream and fish in it?

A. I don't know how to build a boat to go out there in that rough water.

Q. Is the water so rough that the Indians couldn't go out in a boat?

A. How can I go out in them rapids?

Q. What kind of a river is there, smooth or rough?

A. Rock rapids, falls, rough water.

173 Q. Can any person go out in it, in a boat?

A. Nobody can go out there.

Q. When was it that you packed one hundred horses with fish, dry fish?

A. Before Mr. Winans come there.
Q. How long before?
A. About fifteen years ago, from now.
Q. Did the Indians use more fish at the time of the treaty, or less than before Winans come there?
A. Now they are decreasing.
Q. Did the Indians use as much fish after they went over on the Yakima Reservation and commenced farming as they did at the time the treaty was made?
A. We don't get so many as we used to—[question read, We don't use so many salmon now as we used to.]
Q. Do you use as many as you used to at the time when Winans went there?
A. We have used as much salmon as we always did before Mr. Winans come there, but since we have not used as much.
Q. Did the Indians use less salmon after they went on the reservation and began farming than they did before that time?
A. I don't know how the people lives that went over; I have not been on the reservation, but I used just as much salmon as I ever did.
Q. When you were fishing there at this fishery, did you sell any of your fish to the cannery men?
A. I catch all the salmon I want; when I have some to spare I go sell them to buy other food with.
Q. Didn't you sell wagon loads of salmon that you caught over there?
A. I have never sold anyone wagon loads at a time.
Q. To the cannery men?
A. I have never sold any to the cannery men; I have sold as much as a sack full at one time to the hotels around town.
174 Q. Have you got a farm?
A. I have a piece of land.
Q. Two pieces, haven't you?
A. I have two places.
Q. Where?
A. I have a place at Wisham, and one at High Prairie.
Q. How far is High Prairie from Wisham—how many miles?
A. Eight miles.
Q. Is that a good farm up at High Prairie?
A. I have a piece of land that is not very good—half of it is rocks.
Q. A white man has it rented from you, has he not?
A. I have not rented no land to anybody.
Q. Who takes care of that ranch at High Prairie?
A. I take care of it; I go up there and come back.
Q. Do you farm it?
A. I raise a little hay, a little; maybe just a little grain.
Q. Potatoes?
A. Little potatoes.
Q. Other vegetables?
A. Very little vegetables.
Q. Got a house on it?
A. One house—house made out of pine logs.
Q. Got any stock of any kind?

A. Only three head of horses.
Q. Any other kind of stock?
A. That is all.
Q. You spoke of somebody chasing the old woman. Did Winans have anything to do with that?
A. That was Mr. O. D. Taylor.
Q. Was Mr. Winans there then?
A. I never seen them at that time.
175 Q. Were you at the treaty?
A. I remember the treaty like a dream; I was too small then.
Q. Were you present when it was made and signed at the council, do you know?
A. I wasn't there; I only heard from the people that were there.
Q. Where was it; where was the treaty made?
A. Up at Wisham is the place where they made the treaty.
Q. Was Governor Stevens and General Palmer there; did you see them there?
A. I don't remember, because I was too small.

Redirect examination by Mr. ROBERTSON:

Q. Was the place where Winans has got his big fish wheel a big rock that the Indians did not move there at that point, but always fished where Winans fish wheel now is in high or low water?
A. There had been a rock there when the river come up, all they had to do was follow the water, but when it went down they followed it down; now it has been destroyed.
Q. They fished at the same place there all the time?
A. Our fishing place was all right there.
Q. Was that the best fishing place along the rapids?
A. That is the only best fishing place we have had on that river.
Mr. ROBERTSON. That is all.
Mr. MAYS. That is all.
Examination closed.

BILLY SE-HIAM, recalled.

Cross-examination by Mr. MAYS:

Q. Have you got a ranch?
A. Yes, sir.
Q. Were you present at the treaty, when the treaty was made?
A. No, sir.
176 Q. Where was it made, at what place?
A. They went from here, those chiefs, to make that treaty.
Q. Was Governor Stevens and General Palmer here at all?
A. Yes, sir; I know they come here and went off again.
Q. Did they go over there to that side of the river, to the fisheries, or did they meet them up at the treaty?
A. They rode up the river.
Q. Did you see them over here at any time?
A. I didn't see them.
Q. Those salmon that you caught and that they told you to let alone, was that inside or outside of Winans' fence?
A. Inside.

Redirect examination by Mr. ROBERTSON:

Q. Do you live down at the fishery all the time?

A. Yes, sir; all the time.

Mr. ROBERTSON. That is all.

Mr. MAYS. That is all.

Examination closed.

WILLIAM SPEEDIES, a witness sworn on behalf of the plaintiffs, testified through interpreter Martineau, as follows:

Direct examination by Mr. ROBERTSON:

Q. State what you know about these fisheries here, Wisham and Se-we-paum.

A. Well, I am getting pretty well along for age; I live at Wisham; I have been waiting there for salmon to eat. Now-days, this man Lee Winans comes there and destroyed all the fisheries and rock; I can't get no salmon.

Q. Were you ever driven away from there?

A. I used to live there until Mr. Winans come there, fenced in the fishery, and plowed up the roadways where I was in the habit of fishing; now I can't get any salmon.

177 Q. Did Winans prevent you from fishing there at any time?

A. Now, while the salmon is pretty near all gone, I myself and Bill Charley went over the fence, and we hadn't got any salmon yet, and Mr. Lee Winan was there; we had no salmon; they told us to not get any salmon; this was my land, and Bill Charley asked him who said so; Mr. Lee Winans he says, the Government has said so, for me to take this land, Washington says so, to me; this land is ours and I want you to get right away from here; go off over the fence; and he went off and left us; another day the same parties had come to me, another Indian by the name of Dick Wishkins, now to-day I want you to understand what I am going to tell you. I am going to explain the law to you; now, if you want to fish on my land, whenever you catch ten salmon, I want you to take five, and I take five; if you don't do that you have all got to leave here. If you don't mind me I will have you all taken to Goldendale and the law, and then I went home; and another day they got the news from other parties that were there fishing, and they told them. I have not got nothing; my home, the staging is all destroyed and throwed overboard. That is all that I know.

Q. How long have you lived at this fishery?

A. Ever since I can remember up to to-day.

Q. How old are you?

A. When I remember, I don't know my age; when I remember to come to be quite a boy there were no white people anywhere near here.

Q. How old were you when the treaty was made?

A. I don't know how old I was; if I recollect it, I should say fifteen or sixteen years old.

Q. Have you fished in this fishery all your life?

A. My father he fished there and caught salmon first, and after he died I got to be strong enough to fish; I fished there right along until they stopped us.

Q. How many years since you have been stopped from fishing in that place?

A. I never went away unless I had to go some place to pick huckleberries or something, and whenever I go away, I went back there.

178 Q. Do you depend on salmon to live on, principally?

A. That is the only thing we have been raised on; that is all I depend on.

Q. Have you had enough salmon to eat for the last few years?

A. We never had any salmon after that time.

Q. How has that effected your health, if at all?

A. I am just pretty near dried out.

Q. Did you used to be fat when you eat salmon?

A. Whenever I had plenty of salmon to eat I am healthy, I am strong; there is nothing bothers me then except I am sick.

Q. How many Indians used to go there each year to the fishery?

A. I have never counted them, do not know how many, but there was a great many.

Q. Do you remember when the Indian houses were torn down?

A. I remember when they tore down their houses, everything else; I can't tell how many years.

Q. Were there any Indians living there at that time?

A. There were two old folks living there at the time—two old women.

Q. What became of them?

A. They told them now you better go away from here; if you don't go away we will burn you up; we are going to burn up the houses—go on. They had destroyed everything, tore down their houses. The old folks went away and now the ground is plowed up.

Q. Did the Indians make objections to their taking possession of that ground and destroying their villages when it was done?

A. We darsn't say anything then; we had to stay away.

Q. How many fish each year did you put up for your own use?

A. About ten of us would go over to that fishery; we catch probably, about ten of us, would catch one hundred apiece in a day——. Go on—now we don't get any at all; wheel has catched them all. The wheel is here; it is running here; right up in here is the fence, shuts the wagon road off; here is the wheel; the fish have got to go over the wheel; the current is so strong on the outside it is impossible for the salmon

179 to go around; he has got to go right in the wheel.

Q. What becomes of him when he goes in the wheel?

A. All the salmon that go in there go right through the wheel and out the shore.

Q. If they were not there could the Indians still catch fish?

A. If it was not for the wheel I would be fishing there to-day. Our main fishery was just the same as that; then the water comes to the lower place we fish there, and when it goes over that we go up to the next place. On that place it is all torn out.

Q. Could you build stages there if the wheels were not there?

A. We could catch plenty of salmon anyway.

Q. Is the old Indian trails fenced up the Indians used to travel along that fishery?

A. The roads we used to travel there going from the fisheries—coming down this way towards town—is all shut off.

Q. Is the principal Indian roads from one fishery to the other shut off?

A. The main trails are fenced in.

Q. What village was it they removed the houses—the upper or lower village?

A. The principal fisheries they have torn down or houses destroyed, or fish. The houses at the lower place are still there.

Q. Which place do you call Wisham and which Se-we-paum—which was the upper and which was the lower?

A. Se-we-paum is down the river and Wisham is up the river.

Q. Where were the houses that were taken down?

A. Se-we-paum.

Q. Were any houses torn down at Wisham?

A. These houses up there—we have got a few houses—we are living there yet at Se-we-paum—the houses are all torn down and the ground is plowed.

Q. How long has that ground been ploughed?

A. Mr. Winan has been living there about seven years; between that time and now the ground has been ploughed up.

Q. Don't the fences run right along the river bank from the eddy to the northerly end of the rapids.

180 A. The fences run right near the river.

Q. Now, did Winan Brothers cultivate any land between the fence next to the river and the river?

A. They can't plant anything there to grow; it is nothing but gravel and rocks.

Q. Where do you get the water from you drink?

A. Mr. Winans told me that I must not go down to this spring to get any water where we had been in the habit of getting water, and we had to go up the fence about half a mile; but sometimes we stole through the fence, crawled under the wire to get our drinking water.

Q. How long have you been using that spring there?

A. Well, that spring has been there ever since I can remember; I have been carrying water there ever since I can remember. Now, I have to go there and steal water to get it to drink.

Q. How big a spring is that?

A. Small spring.

Q. Will it afford water for a thousand men or five hundred men in a day?

A. We used that only just for the purposes of drinking water. Whenever we want water any more than that it is right close to the river.

Q. How far is that spring from your house?

A. I can't state how far it is; it is pretty close.

Cross-examination by Mr. MAYS:

Q. Isn't Winans' garden and house built inside of the fence and between the fence and the river?

A. Mr. Winans' house is between the fence and the river.

Q. Is your home at Wisham all the year round?

A. I live there all the time.

Q. Haven't you ever lived at the reservation?

A. I never go to the reservation; I live right there all the time.
Q. Have you got a farm?
A. That is my place right there.
181 Q. Haven't you got a farm some place else?
A. I have no other place but right there.
Q. Haven't you got a piece of land about a mile and a half up on the hill?
A. I have a place just a little ways back. I make that my home right there.
Q. How many acres in your farm?
A. One hundred and twenty acres.
Q. Did you use all the fish that you caught there?
A. All the salmon I catch there I dry and eat, and keep them for my winter's use.
Q. Didn't you sell a good many to the cannery people and other white people?
A. All the salmon I catch is for my special use.
Q. Haven't you caught and sold a great many salmon to Winans?
A. I never sold any salmon to Mr. Winans.
Q. Were you there when the houses were torn down at Se-we-paum?
A. I wasn't there.
Q. How do you know, then, what you are telling—that is, as to what took place there?
A. They got the news that went back—said the old lady at Wisham has been driven out of the place, houses all destroyed.
Q. Who tore these houses down you speak of?
A. O. D. Taylor and Mr. Whealdon.
Q. Did Winans have anything to do with it?
A. I never saw Mr. Winans there.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

182 CHARLEY WINNEAR, being duly sworn, on behalf of plaintiffs, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Do you know this fishery down here?
A. Yes; I know it.
Q. Did you ever have any trouble with Winan Brothers over fishing there?
A. Last year.
Q. Just state what trouble you had.
A. I went over there one day and tried to get fish. Winans come there and told me not to stay there—to stay out of the fence.
Q. Go on and state all that happened.
A. So I had to stay out of the fence.
Q. What did he say he would do to you if you didn't stay out?
A. He told me not to fish there, to stay out of the fence; he said, "I told you to stay out of the fence all the time." I was not fishing at all, so I had to stay out of the fence.
Q. Did you refuse to go?

A. No.
Q. Did he say he would put you in jail?
A. No.
Q. Do you know of any Indians being ordered out before?
A. Yes, sir.
Q. How ma'y do you know were ordered off?
A. Lots of them.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

T-WASH-PAM, a witness called on behalf of plaintiffs, being duly sworn, testified, through interpreter, Charley Wannasay, as follows:

183 Direct examination by Mr. ROBERTSON:

Q. Where do you live?
A. I lived at Se-we-paum, there is where my house was destroyed.
Q. Who destroyed your house?
A. Whealdon.
Q. How long ago?
A. About ten years.
Q. How long did you live at Wisham?
A. Ever since I can remember until I am this age now.
Q. How old are you?
A. I don't know my age; I am pretty old; I don't know my age.
Q. How old were you when the treaty was made?
A. I don't know how old I was, but I was married and had a boy.
Q. State if you have every year, since the treaty was made, fished at the fishery?
A. I never would make a mistake; I fished there every fishing season.
Q. How many fish would you cure each year?
A. Sometimes I would dry as much as two or three smoke houses.
Q. About how many fish?
A. That fishery they destroyed, when we used to live there, we got several hundred per day.
Q. What were the principal articles of food; what did you live on?
A. We and our old folks had lived on fish and other herbs, we digged out of the ground.
Q. What else?
A. Fishing season, when it was all over we all generally would move up to the mountains to get berries, after the berries were all gone we all came right back and lived there, bring our dried berries in.
Q. Were fish and berrres all you lived on?

184 A. We lived on salmon, dried berries and other things what we dug out of the ground.

Q. Anything else?
A. That is all we ever had to eat.
Q. How have you lived since this fishery has been fenced in?
A. I eat now the stuff we dig out of the ground.
Q. Have you suffered any for food since this fishery has been fenced in?
A. There are lots of time I wished to get something to eat, such as

salmon. Now I have given up all hopes, and have made up my mind I am going to starve myself to death.

Q. How many Indians are situated that way?

A. Four of us; we can't hardly help ourselves, except we depend on fish.

Q. How many others are in the same condition?

A. There are a great many that is around there; I don't know how many. They all feel very bad about not getting any salmon, and they think they are going to starve themselves to death.

Q. Explain just the circumstance of the tearing down of your house.

A. I was there at my house setting down not knowing anything, I couldn't tell how many years, pretty soon a man come there and he says to me, "If you don't get out of here I will tear your house down." I did not believe him, that he would do it; pretty soon he put a lasso on our house, I got scared and cried, and put a little barrel on my back and took that and went away crying; he said, "If you go to make any more trouble around here, I will put you in jail." I said, "All right you can take me;" that is all I said to him; what little things I had I was picking up and taking away, I was crying.

Q. How long had you lived in that house?

A. I lived there ever since I can remember, until I am this age now.

Q. Who was the man that pulled down the house?

A. Mr. Whealdon.

Q. Did he tear down any other houses at that time?

185 A. It was eleven other houses there that he destroyed.

Q. Where was O. D. Taylor?

A. They lived out right back there.

Q. Has anybody prevented you from fishing there?

A. I have always went there, never said anything to me; I would go there and stand and watch them fish; they never gave me any; I would go home hungry.

Q. How about eels? Did they give away any eels?

A. Only us Indians would catch them, and then we eat them.

Q. Didn't they give you the eels at the fish wheels?

A. They never gave me any there.

Q. How many Indians each year used to go to that fishery?

A. There were a great many come there; I don't know how many. A great many used to come there in early days.

Q. Did the Indians ever give up this fishery before they were prevented from going there to fish by the white men?

A. Never give up.

Q. Wasn't there some Indians also camping there at this house when Whealdon run them away, and didn't they run them away, too?

A. There was nobody there but me. I was there all alone.

Q. At your house?

A. At my house.

Cross-examination by Mr. MAYS:

Q. How many Indians all together are there that lived over there like you did, at Winans fishery; that lived there all the year round?

A. There used to be a great many lived there; in fact, they all used to live around there in the winter time.

Q. How is it now, and for the last two or three years?

A. Now, there is nobody there by me that lives the year round.

186 Q. Did the Indians ever use deer meat, elk meat—anything of that kind?

A. Very few that was able to go out. Them that had arms used to go out and get deer and dry it.

Redirect examination by Mr. ROBERTSON:

Q. Bill Charley lives there all the year round, doesn't he?

A. He is up at Wisham.

Q. Do you live within Winans enclosure, inside of Winans fence?

A. I live at Wisham. I have moved and live with Bill Charley and the other Indians.

Recross-examination by Mr. MAYS:

Q. How many other Indians live there the year round?

A. About between ten and twenty.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

May 20th, at 9.30 a. m., the taking of testimony was resumed pursuant to adjournment.

WILLIAM SPEEDIES recalled for direct examination.

By Mr. ROBERTSON:

Q. Did you ever see any white persons stopped from fishing at the Wisham and Se-we-paum fishery?

A. Yes, sir; I have seen them, when the whites come there to the fisheries; I heard them say, we don't want you to fish here; they said it is our land, and if you want to fish here you must pay me, then you can fish, or you can go away and buy salmon direct from me; if you got any money you can get fish; if you haven't you can just get right out of here; and of course those men they have no money and they go right back, and some of the men that come there that got money, they go there, buy their salmon, and take it home. That is all I know.

Q. How many white men come to the fishery at the time you saw them?

187 A. I seen eight men come there at one time; they was ordered off and they went home without any salmon.

Q. White men?

A. White men.

Q. Did they have any appliances for catching fish?

A. They had nets and barrels and everything on their wagon.

Q. Who stopped them from fishing?

A. Winans ordered them off.

Q. How many times had you seen these white men there; how many years before?

A. They used to come there about four years ago; now they don't come there any more.

Q. Did they always used to come there every fishing season?

A. Yes, sir; they used to come there when all the Indians were there fishing; they used to come and fish with them.

Q. Was there ever any trouble between these white men and the Indians fishing along the fisheries there?

A. They used to come and if they didn't have any net we would let them have salmon free; if they had a net they fished along with us.

Q. Did they live over there in Washington, those men?

A. No; they didn't live over there.

Q. Where did they live?

A. They lived over that mountain on the other side.

Q. On the Washington side?

A. Yes, sir; on the other side of the river, over the mountain.

Q. Were they farmers?

A. They got farms.

Cross-examination by Mr. MAYS:

Q. How do you know what Winans said to these people that you say come there to fish?

188 A. I heard them say, "I don't want you to get fish here; this is my land, my salmon."

Q. Can you talk English?

A. I am a full-blood Indian; I can't understand English, but that is just what they turned around and told me; I don't know the man's name, but he lives over there, over that mountain.

Q. Then you didn't hear what Winans said, you simply heard what the other man told you?

A. He told me, "I am ordered off here; I am sorry I am going home without salmon; I am not allowed to catch salmon."

Q. How did he tell you if you can not talk or understand English?

A. He talked to me in jargon.

Q. These people that live over the mountains, were they white farmers?

A. Yes, sir; they were farmers.

Q. Do you know where they live; did you ever see their farms?

A. On the other side of the little mountain, they have got little farms all along there.

Q. I ask you if you ever saw the farms?

A. I never seen the farms—just what they said.

Q. What are any of their names?

A. I don't know.

Redirect examination by Mr. ROBERTSON:

Q. Did you see these men go there with their wagons and barrels and nets?

A. I seen them go there with their wagons, barrels, and nets.

Q. Did they go right away?

A. They didn't camp there at all.

Q. Were Winans there at that time?

A. He was there.

Q. Was Winans talking to these white men?

A. Yes, sir; they were talking to them.

189 Recross examination by Mr. MAYS:

Q. Did those men take home any fish with them?

A. They didn't take any salmon.

Q. Didn't they take home all of the salmon in their wagon?
A. No; their barrels and nets.
Q. Did you look in the barrels?
A. I seen the barrels in the wagons.
Q. Didn't they buy some fish from Winans, and take it home in their wagons?
A. No; they didn't buy anything; they went home without any salmon.
Q. When was that?
A. Four years now.
Q. Any more come since that time?
A. There was some more come all the time, but I don't know.

Redirect examination by Mr. ROBERTSON:

Q. Did Winans drive them away?
A. They come to buy salmon.
Mr. ROBERTSON. That is all.
Mr. MAYS. That is all.
Examination closed.

MARTIN SPEEDIES, a witness sworn on behalf of the plaintiffs, testified as follows (without interpreter):

Direct examination by Mr. ROBERTSON:

Q. What is your name?
A. Martin Speedies.
Q. Do you know where Mr. Winans live now?
A. Yes; I know where Winans live.
Q. Did you ever try to fish there?
A. I have been trying, but Winans drive me away.
190 Q. How many times did they drive you away?
A. Twice.
Q. When?
A. Last fall.
Q. Did they drive any other Indians away?
A. Yes; all the other Indians.
Q. Were the Indians generally afraid of Winans?
A. Yes.
Q. What were they afraid of?
A. Afraid for catching the fish.
Q. Afraid to catch fish?
A. Yes.
Q. Did you ever see Winans drive any white people away?
A. I know.
Q. Who did they drive away?
A. Man named Kaiser.
Q. Where does Kaiser live?
A. The other side of the mountains.
Q. What place?
A. Block house.
Q. That used to be an old fort?
A. Yes, sir.

Q. What does Kaiser do at his house?
A. Storekeeper.
Q. When did he come to the fishery?
A. Year before last.
Q. How did he come?
A. Wagon.
Q. How many horses?
A. Four-horse wagon.
Q. Who was with him?
A. His son.
191 Q. Did he have any nets?
A. Two nets and two barrels.
Q. Then what did he do?
A. He was going to try to get fish in the rocks there along the river.
Q. Well, what occurred—what did they do?
A. They was going to try to get fish. Winans come there and said, "This is my land."
Q. Just say everything you heard.
A. "That is my land, belongs to me, and nobody can fish here except me and nobody else." Kaiser said, "Why?" "Well, because Washington give this to me—I bought from Washington."
Q. What else occurred?
A. Kaiser laughed at Winans.
Q. Then what did Winans do?
A. Then Winan said, "If you are going to get some fish, we will have you arrested." He was going to try dipping, and Winans come after him, and Kaiser quit and come up there, and he stand up and looked around and said, "I guess I do not know what to do."
Q. Didn't get any fish at all?
A. No; didn't get any fish.
Q. When did he drive you off?
A. Last year.
Q. Under what circumstances? State how he did it. What did he say to you?
A. He said, "If you are going to fish on this place, I will have you arrested and fined fifty dollars, if you are inside of the fence, in the river."
Q. How long have you been fishing there before you were stopped?
A. Since I was a little boy.
Q. Did many Indians come there every year?
A. Every year.
Q. How many?
A. Can't tell how many.
192 Q. About how many?
A. Lots of Indians—I think lots of Indians.
Q. Is that the only place where the Indians can't catch fish?
A. Only two places to get fish.
Q. What other place?
A. Way up at Skin, the other place, and one down below where we are.
Q. Which is the best place to catch them?

A. Where I am fishing.
Q. Se-we-paum?
A. Yes, sir.

Cross-examination by Mr. MAYS:

Q. Where is Se-we-paum?
A. Se-we-paum is where that big stationary wheel is, where Winans live.
Q. Which one of the wheels? Are not the three wheels just the same?
A. The upper wheel.
Q. Did the Indians ever catch any fish and sell them to the cannery men?
A. Yes.
Q. What cannery men—to what ones?
A. What canneries?
Q. What canneries have they sold to?
A. These two canneries up here.
Q. Did they sell any to them last year?
A. Last year they didn't sell any.
Q. Did they year before last.
A. Year before last—a few.
Q. Not much?
A. No.
Q. Half as much as they had been selling before that?
A. No.
Q. Year before that they sold a good deal to the canneries, didn't they, and the year before that?
A. No.
193 Q. Haven't they sold any at all?
A. No.
Q. Any of those years?
A. Two years.
Q. Two years ago and three years?
A. Three years ago they'd been selling; last year they didn't sell any.
Q. Two years ago?
A. Yes; they'd been selling, two years ago; they didn't sell any last year and this year.
Q. Three years ago they sold?
A. Been sold.
Q. Why didn't they sell any last year?
A. Winans drove them away.
Q. Wouldn't let them fish?
A. Wouldn't let them fish.
Q. Why didn't they sell two years ago?
A. Because the wheel catched them all.
Q. Three years ago they sold; is that right?
A. Sold fish.
Q. Four years ago, how was it?
A. Been selling.
Q. Five years ago?
A. Been selling.

Q. Six years ago?
A. Been selling.
Q. All the time they have been selling to the cannery men, except the last two years, when Winans wouldn't let them fish?
A. Yes.
Q. How old are you, about?
A. Twenty-five.
Q. How many Indians are there that live over there the year around by the Winans fishery?
A. I can't count up how many there are.
194 Q. Give us as near as you can, about how many?
A. There are a good many.
Q. Well, does that mean ten or a thousand?
A. I can't count up.
Q. Can't you give an idea; you can read and write?
A. Yes; I can read and write.
Q. Now, then, think it over for a little while, and say about how many Indians there are that live there by Winans' fishery during the whole year?
A. I can't guess; there is a good many, is all I say.
Q. Are there as many as ten?
A. More than that.
Q. Are there as many as twenty?
A. More than that.
Q. As many as thirty?
A. More than that.
Q. As high as fifty?
A. More than fifty.
Q. That make their homes through the entire year?
A. Yes.
Q. That don't go and live on the reservation?
A. No.
Q. Are there as many as one hundred?
A. About sixty or seventy; I can't tell exactly. I didn't count before I come.
Q. You mean all the women and children, everything, when you say sixty or seventy, do you?
A. Yes; everything.
Q. Do all those that you speak of living there live in Indian village just back off toward the mountain from Wisham?
A. Yes; they live there; and when the huckleberries are ripe, they go up in the mountains and pick berries a while and come back and stay there?
Q. Do all the people that live there the year around live at this Indian village?
A. They live there all now.
195 Q. And you think there are as many as fifty or sixty, or sixty or seventy, living there in that Indian village all the time, year round?
A. All the time; year round.
Q. Don't you know there are no more than forty the year round?

A. All I know, about sixty.
Q. What Indians go to the fishery at Skin; what tribe, I mean?
A. I don't know what tribe they are; different tribes.
Q. Do you go there sometimes?
A. No; never go up there.
Q. Do you know about how many Indians go to fish up at Skin?
A. No.
Q. Before two years ago the Winans didn't keep the Indians from fishing there, did they?
A. Yes, sir.
Q. Before that?
A. Yes, sir.
Q. I thought you said a while ago they didn't fish there last year and the year before, because Winans kept them from it?
A. Last year, I think I said.
Q. Year before—did he drive you away then?
A. That time before that fence he builded up, he drive us away.
Q. It was after the fence was built up he drove you away, wasn't it?
A. Yes.
Q. Did they drive you away at any time before two years ago?
A. No; except last year.
Q. Is there a fishing place up at Salido?
A. Fishing place.
Q. Do you mean there is a fishing place?
A. Yes; there is a fishing place up there.
Q. Do you go up there to fish any?
A. When low water goes down, away down, then waters getting kind of clear, no salmon. I can't get any salmon when water is clear, except in the falls, and salmon go over; I get the fish there.
196 Q. When it gets too low to fish down at Winans fishery, then you go to Salido, don't you?
A. No.
Q. When do you go to Salido to fish?
A. I never have been to fish up there.
Q. I thought you said you fished up there when the water go' too low?
A. Not me.
Q. The other Indians do?
A. Yes.
Q. Can the Indians go to Salido, without any fence around the place there?
A. Yes; Salido fishery.
Q. Do you know?
A. I don't know; I never been there.
Q. Is the Skin fishery fenced in?
A. Fenced in.
Q. Is the fishing place at Skin fenced in?
A. There is a fence around it.
Q. So that the Indians can't get to that fishery?
A. I never been up there; if I had been up there I know. I been all the time in my place.
Q. Then how do you know it was fenced in?
A. I hear about it; I see the paper—newspaper—myself.

Q. Does the newspaper say it is fenced in up there at Skin?
A. Yes.
Q. What newspaper?
A. Goldendale Sentinel.

Redirect examination by Mr. ROBERTSON:

Q. What does these Indians always live on up there—what do they eat?
A. Been eating fish.
Q. What have they lived on since they couldn't get fish to eat; what do they live on now?
197 A. They live on—they used to been living on salmon—now this time they live on coffee, deer, and flour.
Q. How do they get these things? How do they get money to buy them?
A. They make sinches to get them.
Q. Do they have to buy salmon now?
A. They buy salmon from Winans now.

Recross-examination by Mr. MAYS:

Q. Do you know Bill Charley?
A. Yes, sir.
Q. He lives there at this Indian village, don't he?
A. Yes, sir.
Q. Good many of those people that live there they have farms, haven't they?
A. Yes, sir; they got farms.
Q. You got a farm?
A. Yes; I got a farm.
Q. Where is your farm—about how far from that place?
A. About six miles.
Q. Does the river rise pretty high each year?
A. Pretty high each year.
Q. About how high; or, about what time does it generally rise?
A. I can't tell how many feet.
Q. What month?
A. In the month when the water comes.
Q. Is it in January or June?
A. Water rises up; yes.
Q. The high water is generally in May, June, and July each year, isn't it?
A. When water rises up, yes; big water generally about this time of year.
Q. Do you know what month this is?
A. No.
198 Q. High water comes with warm weather?
A. Yes; high water comes when warm weather.
Q. About this time of year or a little later?
A. Yes.
Q. How many months good fishing?
A. Whole summer, if Winans don't drive them away. Right good whole summer.

Q. Is it very steep banks at the Winans fishery, or does high water run out over a good deal of ground?

A. When high water comes?

Q. Yes.

A. Well, water comes high sometimes; sometime low, sometimes comes low or high.

Q. When comes high water does the river spread out over more ground—run over the banks?

A. Sometimes covered, but sometimes not each year.

Q. When the water is rising do you have to move the place to fish back further on the shore?

A. From where I am fishing; yes.

Q. Fishing place?

A. Yes; back there every day when high water comes.

Q. Have to move back fishing places every day?

A. Every day.

Q. Then, when water comes low—not so much water—move towards the river again as the river goes down?

A. Yes, sir.

Redirect examination by Mr. ROBERTSON:

Q. Do the fish wheels get all the fish there?

A. Fish wheels get all the salmon.

Q. Can you catch fish with a net when the fish wheels are running?

A. No.

199 Q. When the fish wheels are not running can you catch fish there?

A. When the wheels are hoisted up, catch one or two salmon.

Q. When hoisted up you can fish with net?

A. Yes.

Q. When wheel down can't catch any?

A. No.

Recross-examination by Mr. MAYS:

Q. Two years ago, when the lower wheels were in there, didn't you Indians catch fish with a net above the lower wheels?

A. No.

Q. Before the fences were put around the upper part didn't you fish with nets and catch fish at the upper part when the lower wheels were running before Winans fenced the ground at the upper part—didn't you catch fish with a net above the lower wheels?

A. I don't understand.

Q. First, Winans have lower wheels, didn't they have lower wheels first before they built the upper wheels?

A. Wheels built three years now.

Q. Then didn't you catch fish with a net up above where those wheels are at See-we-pam?

A. These wheels are here and when up here we fish last two years.

Q. Then you did catch fish?

A. Didn't catch any fish.

Q. Haven't you caught fish with a net above the wheels three years ago?

A. Three years ago.
Q. Didn't you?
A. Yes.
Q. Didn't you, two years ago, opposite Wisham, along there above See-we-pam?
A. We fish above the wheel.
Q. And didn't you catch fish there when the wheels were running down below?
A. No.
200 Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

MARY SPEDIAS, a witness sworn on behalf of plaintiffs, testified as follows, through interpreter:

Direct examination by Mr. ROBERTSON:

Q. Where do you live?
A. Down the river.
Q. Where?
A. Wisham.
Q. How long have you lived there?
A. See my head, I am an old lady. When I was young there were no white people around here.
Q. Was you born there?
A. Yes.
Q. What was your father's name?
A. Shikes.
Q. Did he help make the treaty?
A. He was there.
Q. Where is the principal place for the Indians to fish on the Columbia River there?
A. See-we-pam and Wisham.
Q. How many years have you caught fish there at See-we-pam and Wisham?
A. Never go any other place but there; go there all the time. There was no white people yet; there was only Indian people. My father was taking care of all the Indians there. I don't know when the white people come to this country. I didn't know they was going to build lots of houses here. When I got to be a woman then all come; that is the treaty and I was there. Then afterwards some more white people come.
Q. I don't care about the white people coming; I want to know about this fishery?
A. I know about catching fish there. My father fished there. We
201 catched salmon here, dried them, and when it was dried we buried it in the ground; that is what we keep for winter's supply. And just now, where the fishing ground is now, Winans put up a fishing wheel there, and the Indians never go there any more. You see I am dry now; I got no flesh on me now. Then, later, he fences clear around; that is the way he treats us now. We can't go. We are afraid to go in the fence there to get water. We dry for water also; we can't get water and we can't get salmon.

Q. Where did you used to get water?
A. There is one spring there then; we go to the river and get water.
Q. How far is that spring from the river, or from your house?
A. Not far.
Q. Have you ever been prevented from getting fish yourself?
A. They told me not to go in the fence there. Lee Winans told me this, don't you see our fence here; you have no right any more to go under this fence; that is enough.
Q. When was that fence put up?
A. Last fall.
Q. When was the other fence put up around See-we-pam?
A. Last year.
Q. That is, the upper fishing place was fenced up last year. How long has the lower fishing place been fenced in?
A. I don't know whether it is four years or longer.
Q. Where are these fish wheels placed with reference to the fishing place?
A. Right there at the fishing ground. The fishing place is where the wheel is.
Q. How many Indians used to come each year to catch fish?
A. Lots of them.
Q. How many.
A. Good many.
Q. Have you any idea with reference to the number—100, 500, or 1,000?
A. Sometimes come one time 40, 50, or 60.
Q. Sometimes more?
A. Yes, sir.
202 Q. How many salmon did each Indian family put up each year for their use?
A. When it is good run salmon in good season they put up good many salmon.
Q. About how many—10, 20, 30, 40, etc.?
A. More than that. Some did not know how to fish, and catch less fish to put up; but ourselves—we know how to fish—we get more than anybody.
Q. How many months in the year is good fishing there?
A. Two months is the best fishing.
Q. How many months is it possible for the Indians to fish?
A. Three months.
Q. Is that time all the time the Indians used to go there?
A. Yes.
Q. At the time of this treaty was all the land around this fishery open and unenclosed by fences?
A. There was no fences there.
Q. Was there any white people lived at this fishery or at all, or around it at the time of the treaty?
A. No.

Cross-examination by Mr. MAYS:

Q. Did the Indian women there ever use nets?
A. Yes.

Q. Have you got a farm?
A. We got a farm away back there.
Q. About how far?
A. About a mile and a half.
Q. Do you live on the farm or at the Indian village?
A. We got a farm but we never live there. We live down here all the time.
Q. At the village?
A. There where I live; there where my house is.
203 Q. How many Indians lived at the village during the winter season?
A. Nine villages, and each house there is Indians. There are nine houses.
Q. About how many in each house in the winter time?
A. Three or four, sometimes one person; that is, old ladies, and some other houses a good many.
Q. How many men in one house?
A. Sometimes eight and nine. Then there is some all children, little boys and girls.
Q. Can you tell about how many persons altogether live there in the winter?
A. I don't know; I can't tell.

Redirect examination by Mr. ROBERTSON:

Q. Don't some Indians also camp in tents and live in teepees there?
A. Yes; some does.
Q. They take the teepees and tents with them up to the mountains and bring them back?
A. Yes.

Recross-examination by Mr. MAYS:

Q. When they live there in tents, that is during the warm season, not during the winter, is it?
A. Yes; we got different kinds of houses for winter, and we live in teepees in winter.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

J. H. WOOD, witness sworn on behalf of plaintiffs, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. Mr. Wood, where do you reside?
204 A. I am living at the present in the city of The Dalles.
Q. How long have you lived in this vicinity?
A. I have lived in The Dalles, in the vicinity, from the year 1860, not farther away than Goldendale from the year '60 to '79, with the exception of three years I was in Linn County.
Q. Nineteen years, from '60 to '79?
A. Yes, sir; three years of that time I was away.
Q. Since that time have you resided here continuously?
A. I have been here most of the time. Two years ago last January I came back to this place.

Q. What is your age?
A. Forty-four.
Q. Occupation?
A. Minister.
Q. What denomination?
A. Methodist.
Q. Are you familiar with the fishery known as the Wisham and Se-we-paum fisheries, by the Indians now claimed, at the point where Mr. Winan's house now is?
A. I don't know where his house now stands. I know the Tumwater fishery and two points where the Indians used to fish; I don't remember their names. I heard them years ago, but I have forgotten.
Q. Do you know that is the point where Winan now has his fish wheel?
A. I have heard so.
Q. Are you familiar with the typography of the country there?
A. I remember considerable about it?
Q. Do you remember a big eddy below the rapids?
A. I do not know. I could call that to mind—I couldn't place it now. I knew it years ago.
Q. Just state generally what you know about the extent and character of the fishing that was carried on there between '60 and '79.
205 A. I knew that it was for the Indians; it was headquarters for their summer's fishing, and was also used by white people many times going in there and getting their supply of fish, as we called it the Tumwater fishery. It seems to me at that time it covered that section of country, including these two special points there. During their fishing season it was a general rendezvous for the Indians coming there, and a camping place; large numbers catching their summer supply of fish and drying their fish there. They would come and go during the entire fishing season, sometimes in small numbers, while at other times run from three to five hundred, may be more, at a time. I remember the year '77 that the chief among them, known as Skamia, had quite a number of followers; was stopping there in that place, making his headquarters there a good part of the time. We were always, during the days of my boyhood and as I grew up to be a man, used to be acquainted with a great many of the Indians. They would always claim that their main dependence for meats was in the fish supply they gathered at the Tumwater.
Q. You knew that to be true?
A. Yes; as far as my observation would inform me.
Q. There are two points of Indian habitation along that fishery?
A. Yes; one above the other. I don't know exactly the distance, but I remember having seen them.
Q. Do you know about how many houses there were in each of those places?
A. No, sir; I wouldn't undertake to say.
Q. Have you ever traveled the Indian trails in the vicinity of this fishery?
A. I have gone up and down the river, made many trips to Goldendale, horseback, gone to Columbus along the river, back and forth there over that ground—I have never taken direct across—all the main thor-

oughfares down to Tumwater. I have gone up and down the river many times. When I go to the mountains in the place of following the road would take the trail that would run acrossing other trails—running into those trails that went to Tumwater.

206 Q. Were you familiar with the trail to the reservation and from the fishery to Mount Adams?

A. I couldn't tell any particular trail. I know there were a number of trails. After they would get away from the river a little piece they would diverge and run different directions from the river. There was one main trail about half a mile; then they diverged there in the flat. I don't know; I wasn't in the habit of going down to Tumwater, but I suppose there must have been a flat there, from the general lay of the country.

Q. From what you have observed of this fishery since you have known it in 1860, would you say that was an accustomed place of the whites and Indians on the river?

A. I would say it was.

Q. Have you ever investigated or attempted to learn whether it had always had been used by the Indians?

A. All I know about that is, it was the case when I came here; and the inference I would gather was it had been for some time back—I couldn't tell how long.

Q. Are you familiar with the water in front of that fishery?

A. No, sir; I am not.

Q. You know it is a rapids there?

A. Yes; I know that.

Q. Do you know of any point on the Columbia River where fishing to the same extent that was carried on at this point was carried on by any other persons or Indians?

A. No, sir; there used to be considerable fishing about Salido. I always assumed this was the principal point.

Q. In fact it is generally known all over this country; the Tumwater fishery is known as the principal net fishery and other primitive appliances, is it not?

A. That is the way it has been known to me.

Q. Do you know how many of them remained at the fishery all the year round?

207 A. No, sir; I do not. Some seem to make it their permanent home; some remained there most of the year round; others would be transient.

Q. Have you had opportunity of observing the modes of living among the Indians?

A. I have.

Q. From your observation of their methods and modes of living, would you say that salmon was one of their principal articles of food?

A. Yes, sir; emphatically.

Q. In fact, there is not much game of any kind that the Indians can depend on for food now in the country, is there?

A. I know the Indians used to take about this course: When they left the reservation and come over here fishing, and they would dry fish until they got large quantities—I suppose enough to last them a year; then

they would strike to the mountains for berries and end up on the reservation. That is just about the course they would take, relying principally upon the fish—that was their main supply.

Cross-examination by Mr. MAYS:

Q. I wish you would tell me where you did live and the times you lived at each place from '60 to '79.

A. I lived a few months, beginning at the first, as we called it then, Rock Island. I lived part of the summer where the town of Goldendale now stands; I think that was in '61. Then my people came back to The Dalles before the winter of '61 and '62, and we remained here in The Dalles, I think, until '64, when we went to Lebanon, Linn County, Oregon, and came back in '67, and then remained in The Dalles until we moved out to Fifteen Mile Creek, south of here; I think that was in '69; we staid out there nearly five years, and then back to The Dalles; then over to Goldendale, and lived there; I don't remember the time we staid at The Dalles—I think '74 and '75; '77 and '78 that I moved back to Goldendale. We lived here and out in the country from the time we moved out there; I don't remember the day; I think nearly five years. I staid at Goldendale about a year.

208 Q. Well, how much of the time from '60 to '79 were you in The Dalles—immediately about and in The Dalles?

A. Must have been about ten years. About that time.

Q. I mean while you were living in The Dalles.

A. Well, I have given you in a general way. I was in Goldendale, I think—lived in Goldendale in '61; then it was in the fall or winter of '78 my school began; I went to Goldendale and taught school a year; that took me to Oregon in '79; that was the time I entered the ministry.

Q. You have lived in this locality since then until two years ago?

A. Two years ago last January I was appointed to this place as pastor.

Q. Five years of the time you say you lived at Fifteen Mile?

A. Nearly five years.

Q. How much of the time were you here between '60 and '70?

A. From the fall of '64 to '67 we were in Linn County; in the summer of '61 we were in Klickitat County.

Q. How many times during the ten years between '60 and '70 were you ever at either of these places you mention as the Tumwater fishery?

A. I don't remember about that; I couldn't tell that with any degree of definiteness; I don't remember that I ever went right down to the river at either one of these points; I have passed by them along the different trails and up to the mountain on the other side, going up and down the river; I don't remember that I ever went down to the river.

Q. Did you ever go close to the river near either one of them?

A. I have not been far from it; I can't remember where the closest point was because of this fact: In passing over that country on horseback, going back and forth to Goldendale, sometimes up to Columbus, half the time no special object in view, I have rode off this way and that way to see what was there, etc.; I did that just without any special purpose in view, while other times I have gone on a higher course up the river over to Klickitat. I wouldn't undertake to say how many times I have been there or how near I have been; I have been up the river on both

sides; on this side I have been up and down among the hills
209 hunting stock; you can see that country from this side of the river very plainly.

Q. Isn't this about the fact, that in traveling on this side of the river and also in going up the hill on the other side of the river you have seen these locations where the Indians' houses were, and that this is all you know about the location of the particular fishery from seeing them?

A. Yes, sir; I have never been there to investigate them at all.

Q. When you speak of there being so many Indians there in that particular locality, do you mean to be understood as knowing from which particular fishery or fisheries they came, or where those people were engaged in fishing; do you mean to be understood as knowing at what particular fishery or fisheries they were engaged in fishing?

A. Only in this much, that I have seen the Indians, when I would be on the opposite side of the river at the fisheries working with fish, engaged in their work; I have seen them on this side of the river engaged in work, I supposed fishing at each place; I have talked with the Indians when they would be engaged there fishing, and asked them where they lived, and after them pointing either this place or that place I asked them if they were fishing, and they said "Yes; we catch fish there, dry fish there." I gathered my information that way, never thinking I would have to testify where they got the fish.

Q. You have spoken several times in your testimony about going over that country and gathering information; I am endeavoring to get information from you to show that you have been over that country in the sense that you have stated in the neighborhood of the particular fisheries along there, and that you have passed generally over the country between here and Goldendale.

A. I mean that I have been down there close to where the fisheries were, but not right at them.

Q. Do you know where this Skamia fishery was?

A. No, sir; I do not.

210 Q. Do you know where the Skin fishery was?

A. Not by that name.

Q. Do you know where the was?

A. I don't know any special fisheries; I have talked with Skamia myself; always when I talked with him he would say, "I am stopping at Tumwater, fishing at the Tumwater fishery."

Q. Isn't the whole rapids, including the upper and lower rapids on both sides of the river between here and Salido, spoken of generally as the Tumwater, and wasn't that the case?

A. I never understood it to take in both sides of the river; I always thought it applied to that particular place where the Indians gathered to fish.

Q. Doesn't it mean swift water?

A. Yes; but I think the application was to the other side. I never associated it with this side at all.

Q. Never understood it to apply to this side at all?

A. No, sir; when an Indian said Tumwater, I always thought he referred to the other side, where the Indians camped.

Q. From here, wouldn't all the various fisheries, whatever number there may be on the north side of the river, be referred to as being in the same direction?

A. Skamia always told me that he was fishing at Tumwater; I don't mean by that to say he was at this particular place or that particular place; I always understood Tumwater included that particular locality; Skamia never said he was at that particular point or a lower point, but he would always say Tumwater; I applied it to that place, including those two villages—never to this side or up in that country or down this way below the rapids, but that particular part of the country.

Q. You have spoken of those two villages, these particular points; what do you mean by that?

A. I mean they were camped there, though what distance there was between the two villages I don't remember, or the names; I say
211 the Tumwater was that particular part there, including that scope of country where the Indians congregate.

Q. Do you know that they or either of them are the places that are being referred to as Winans fishery?

A. I do not know where Mr. Winans' fishery is.

Q. So then the place you have been talking about you don't wish to be understood as saying they are the particular points in question here in this litigation, do you, Mr. Wood?

A. No, sir; I do not locate your litigation; I knew it was Tumwater, I didn't know Winans' fishery or what piece of land in particular you have in litigation; I couldn't to-day name either one of these points.

Q. Do you know a pass out there about a mile or so from the Indian villages where the trails go through between two bluffs, which is the means of ingress and egress down to these villages?

A. I don't know exactly the distance you refer to; I was trying to call to mind the lay of the country there where I had traveled.

Q. This pass where I refer to would be, say, sixty yards wide, rather large precipitous bluffs on each side, being near the river where it makes the bend, it being a mile or so out north of where the villages are.

A. There is a place that now comes to my mind where the trail that was frequently traveled by the Indians passed between two bluffs; it seems to me the direction there was northeast and southwest of that place, if I remember; I have passed along through there; I don't remember the distance from the river, I should judge a mile and a half; it was to the right of the road between here and Goldendale; I have taken it a number of times horseback; it was closer than the main road.

Q. Isn't that place you are referring to west of the old man Taylor's place?

A. I don't remember the lay of the old man Taylor's place.

Q. It is one of the old places—McNarie place; you may remember it.

A. It seems to me that it is northwest, pretty nearly northwest of the Bonnell place, it appears to me it was.

212 Q. That would then be between the farm that was enclosed there and the main road running from here to Goldendale, would it not? I do not mean to say west; that would be on the west of the farm enclosed over there and between here and the main road leading from here to Goldendale?

A. It appears to me it was a little west of north of this Tumwater place, and that would be between that and the road following the same direction between that and the main road; it has been a long time since I was through there.

Q. Is that up there in the neighborhood of where the river makes a bend at the head of the rapids—this pass you speak of?

A. It is a little northwest of it, I think.

Q. Is it close to that, or is it back towards the trail that runs between here and Goldendale; is it nearer the river or the road?

A. I thought about halfway between the two.

Q. From where the river makes the bend to the road it is as much as three or four miles, is it not?

A. Following the direction to those places I should think I may be justified in that; I shall make a rough estimate to be three or three and a half miles; I don't know; I wouldn't venture that as anything definite; I have not charged my mind with it—it might be five miles.

Q. Did you pay much attention to the fishing business between 1860 and 1879?

A. Only as I came in contact with the Indians.

Q. Most of the time you were away you were going to school?

A. Part of the time.

Q. Worked part of the time?

A. Part of the time; sometimes riding over the hills, sometimes go out hunting stock with the others.

Q. Did you have any engagements in the stock business?

A. Only hired to a man as somebody else would; I like to run over the country; I had a saddle horse most of the time.

213 Q. Were you paying any special attention during any of that time to the customary fisheries or to the Indians' rights generally?

A. No, sir; I was not investigating those things then.

Q. There are other rapids between here and Salido than the rapids that you have referred to here, are they not?

A. I think so. I don't know how it is in the river there now.

Q. The river is not navigable, even above the property in question, until you get above Salido?

A. My knowledge is it is navigable only above Salido.

Q. There are falls above Salido?

A. Yes.

Q. Do you remember seeing an Indian village near, and opposite Salido, there at any time?

A. I have noticed along the river there at different times little encampments. I never saw anything there I call to mind that impressed me with an Indian habitation like it did at these points we have mentioned; no headquarters to speak of; I have seen camps scattered along there at different times.

Q. I refer to dry houses, etc.

A. I was not impressed by none there as much as this.

Q. Did you ever go by that particular locality during those years?

A. The other side I have, or either side.

Q. Either side?

A. I have been back and forth repeatedly up and down the river; I have only gone from The Dalles up to Columbus along the river; I have gone up considerable distance back in the hills, taken different trails, and gone back on the main road, riding over nearly all that country.

Redirect examination by Mr. ROBERTSON:

Q. I show you a plat that has been introduced in evidence. This point marked F. W. is the upper end of the rapids and the beginning of the rapids, where the evidence shows Mr. Winan has a scow fish
214 wheel; down here is the lower end of the rapids, where an eddy was; here is where Winan's house now stands, and where the evidence of the Indians shows there was an Indian village or habitation, which has now been torn down; up here, and about from a half or a mile farther, is the other Indian village that now stands; the river runs down this way. Is that the section of country to which you have referred in your testimony?

A. This is the head of the rapids; this big eddy down below here is where one Indian village was, and here the other.

Q. Those are the settlements you refer to?

A. Yes, sir; as I understand it.

Q. Between the rapids and the big eddy down here?

A. Yes, sir.

Q. The Tumwater referred to—that point along the rapids between those points?

A. Yes, sir; between those points.

Cross-examination (in chief):

Q. When the Indians used to meet there or used to be around in that locality, they met for horse racing, did they not, and other sort of contests?

A. My understanding was they met to fish, and threw the horse racing in.

Q. As a matter of fact, then, these extensive meets for horse racing and that sort of contest were had at other places than in the neighborhood of the fisheries, were they not, in those days?

A. They had fisheries and gatherings for horse racing.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

Captain M. MARTINEAU, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. What is your name in full?

A. Michelle Martineau.

215 Q. Where do you live?

A. I live no particular place; I have a home about two and a half miles up above the Upper Cascades, on the Washington side.

Q. You have lived in this vicinity all your life?

A. Yes.

Q. What is your business?

A. Steamboat master.
Q. Now engaged in that business?
A. Yes, sir.
Q. What steamboat?
A. "D. S. Baker."
Q. She plies between The Dallas and what point?
A. She has not run any yet; we brought her up from Portland, and expect to use her in case the water becomes too high for the operation of the O. R. & N. between here and Portland.
Q. You are familiar with the fishery on the Columbia River at the point (between) where Mr. Winans now live?
A. Yes; I've been out there.
Q. State what is the general character of that fishery; how long you have known it.
A. I've been over there several times; I suppose for the last thirty years.
Q. You have known the fishery for thirty years?
A. Yes, sir.
Q. During that time state what has been the number of persons, of Indians, that go there each year, if you know.
A. I know all that belong to that tribe, on that side of the river; that is where they all gather in the fishing season.
Q. Would it go into the hundreds?
A. Yes; two or three hundred.
Q. How about the trails going there?
A. I have never traveled over the roads any.
216 Q. You are familiar with the fisheries on the Columbia, are you.
A. Yes, sir.
Q. State whether or not, for the last thirty years, this place where Winans now have their fish wheels has been the principal and accustomed place of fishing for the Indians with nets and other primitive appliances.
A. That was the only place they had to fish along there.
Q. You are familiar with the Indians' character?
A. Yes, sir.
Q. You speak the language?
A. Yes, sir.
Q. What has been their principal source of food during the last thirty years?
A. Their principal food is fish.
Q. What else?
A. Roots and stuff they took out of the ground.
Q. Where have they obtained this fish; where did they catch it principally?
A. Right up here between the big eddy and the upper end of the rapids.
Q. That is along the points that Winans have fenced in?
A. Yes, sir.
Q. Taking out the places along the Columbia where Mr. Winans has his fence enclosing the river, is there any other good fishery for the Indians to catch fish with nets?
A. Not anyways between here and the head of the rapids.

Q. From your knowledge of the Columbia River, would you say that is the principal fishery along the Columbia to catch fish by hand gear?

A. It is the principal place.

Q. What would you say about it being the place in the last thirty years; hasn't more fish been caught at that place than all other places put together?

A. Yes; between here and Salido.

217 Q. What is the name of those two places? What Indian names are those fisheries known by?

A. Wisham and Se-we-paum.

Q. You say there has been more fish caught at Se-we-paum and Wisham the last thirty years than any other place along the river?

A. Yes, sir; that side of the river between here and Salido.

Q. Isn't that the fishery where most fish has been caught?

A. Yes, sir; that is the greatest fishery where fish is caught any place along the Columbia between here and Salido.

Q. Any other places good fisheries?

A. Yes, sir; just about as good at the Cascades.

Q. Is that fishery open to the Indians?

A. No, sir.

Q. Who has it enclosed?

A. Mr. Warren and George Stephenson.

Q. So the Indians now have no place to fish?

A. No, sir; they have all been driven away from the river.

Q. While it is true there may be as good places at the Cascades as Se-we-paum the Indians of the Yakima Nation always fish at Wisham and Se-we-paum?

A. Yes, sir.

Q. You never knew of them fishing at the Cascades?

A. No, sir.

Q. Any fish wheels at the Cascades?

A. Yes, sir.

Cross-examination by Mr. MAYS:

Q. You say it is enclosed at the Cascades?

A. Yes, sir.

Q. On the Washington side?

A. Yes; Washington and Oregon side.

Q. Are you sure it is enclosed on the Washington side?

A. They have got signs along there.

218 Q. I will ask you what you mean when you say it is enclosed on the Washington side; what do you mean by enclosure?

A. I mean this way, they keep the people from going in there; they got signs stuck all along there.

Q. Trespass notices?

A. Yes; trespass notices.

Q. Is it surrounded by fences of any kind?

A. It is, on the Oregon side.

Q. Is it on the Washington side.

A. No, sir; not any on the Washington side.

Q. The only thing that keeps the Indians away is the fact that they are warned away through notices?

A. Yes; through these notices along there. All the fishing places that have been used for years, they all have been destroyed and they have wheels in their places. At Wisham and Se-we-paum they have no other place to fish except the eddies; they can't use a dip net in the eddy; they have got to be on a swift point to fish with a dip net.

Q. You say the Yakima Indians fish there at the Cascades?

A. Not that I know of.

Q. Not during your time?

A. No, sir.

Q. Don't you know it to be a fact that they did fish there, not all of them, but more or less, long ago?

A. There was a few people that lived at Hood River that used to go down there and fish with sein's.

Q. You mean the Indians?

A. Yes, sir.

Q. There at Cascade is where the Yakimas and whites fought in '55, along there?

A. Yes; '56, I think it was.

Q. Aren't there fisheries at White Salmon, Little White Salmon?

A. There are certain times of the year, fall of the year, they fish in that stream or the different streams around there.

219 Q. There are houses and Indian villages still standing there, are they not?

A. Where?

Q. White Salmon, Little White Salmon.

A. That is old Indian villages you mean?

Q. Yes; and there were also a few Indian villages standing on the Washington side along the Cascade, was there not?

A. Yes; very few.

Q. When were you on this fishery you speak of as Winans fishery?

A. Well, I guess about fifteen years ago, I think was the last time I went through there.

Q. Do you know whether that property is enclosed or not with a fence?

A. It is enclosed now; yes, sir.

Q. How do you know that?

A. I can see from this side of the river.

Q. Have you been there and seen?

A. Yes; this side of the river and up and down the river.

Q. Where does the fence begin and end?

A. Just the upper end of the big eddy and runs up to the end of the rapids.

Q. Don't it run on quite a little distance above the upper wheel?

A. I couldn't say how far up, only I know it runs from the upper end of the big eddy up to the head of the rapids.

Q. From where you traveled when you saw this fence along the river, how were you traveling when you saw it?

A. I went up this side, up above the cannery.

Q. You were looking across there to see how Winans' fences ran?

A. Yes, sir.

Q. How came you to be looking how his fences ran?

A. I think what the people had been telling me, and I took notice of it.

Q. When was that?

A. Last summer.

220 Q. Was there fences there enclosing the whole thing?

A. Yes, *sir*; *as far as I could* see.

Q. You couldn't see it all the way?

A. No; some places where it was hilly I couldn't see where the ground was high; I could see the post all the way along.

Q. The custom of the Indians was, or each tribe, rather, had to itself a certain fishery, was it not?

A. Yes; each tribe always had certain places to fish.

Q. When you speak, then, of the Yakima tribe having no other place to fish than those up here, do you mean to be understood as saying there are no other fisheries that the Indians can get to, or that is the only one of their fisheries that is left?

A. That is the only one there is of that tribe.

Q. You know of fisheries up above there, do you not?

A. There is a fishery up at Salido; there are fisheries on both sides of the river.

Q. Do you know where the Skin fishery was?

A. No; some place right there at the falls.

Q. What falls? Falls of Salido?

A. Yes.

Q. Was there ever any fishery there where the Winans are that was called the Skamia fishery?

A. I don't remember it. I know the Yakima tribe's fishery there—Se-we-paum and Wisham.

Q. And there was another tribe that fished up at Salido, and Skamia was the chief of tribe, was he not?

A. I think he was.

Q. Captain, is it not a fact that after the Indians were put upon the reservation and since then that the increase of civilization among them has caused the use of salmon to grow less, gradually, and it has gradually grown less and less?

A. Since I can remember salmon is getting very scarce for what it used to be fifteen or twenty years ago.

221 Q. Take it, from, say, 1860 up to 1875, had the use of salmon not grown less with the Indians as civilization advanced with them?

A. They had been growing less.

Q. How early were you acquainted with the fisheries between here and Salido?

A. Ever since I can remember, off and on.

Q. How old are you, Captain?

A. I am forty-nine years old last March.

Q. You have been acquainted with this portion of the Columbia River since your infancy, have you?

A. I have lived around here all of my lifetime; I have been on the Columbia River; the principal place I have been is on the river between Astoria and the head of navigation on the Columbia River and Snake River and Willamette also.

Q. Were there any other fisheries between here and where the Se-we-paum fishery is?

A. No, sir; I have never seen them fish any other place than in this water.

Q. Do you know if whether this side of the big eddy in what was formerly Alexander's field, there wasn't a fishery there?

A. They fished; it was no real good place; never used it much.

Q. They had Indian houses?

A. Yes; there were so many they couldn't stop all at one place; had to string along.

Q. As a matter of fact, Captain, they fished almost anywhere between opposite The Dalles and Salido, did they not?

A. They fished along at certain places.

Q. Between opposite The Dalles and Salido?

A. Yes, sir.

Q. There were a great many; they fished at some that were better and some not so good?

A. Yes.

222 Q. About how many would you think, Captain?

A. What do you mean?

Q. How many places?

A. The main camping ground there was but two places; where the main camping ground was, was Se-we-paum and Wisham.

Q. What about Skin?

A. A few there.

Q. Wasn't that the place of another tribe, and a big place?

A. Yes; it was not so big a place as this place down below here.

Q. Skin, that is Salido?

A. It is on the opposite side and a little below, right at the head of the rapids; the rapids there go almost straight across.

Q. Aren't there Indian villages still standing there, something like a mile below and opposite Salido?

A. Yes; just below the rapids; just a little way below the rapids.

Q. The rapids extend some distance?

A. Very short rapids; kind of a jump off on one side, on the Washington side, perpendicular; that is, on the Washington side, and a jump off on the Oregon side; right perpendicular bluff.

Q. At these fishing places, did the Indians have any regular fishing points where their fish stands were, or were they compelled to change their points to farther back up the bank, up the slope, as the waters rose, and the same way as the waters fell?

A. Yes; they had kind of roadways that had been built and had been used for years; kind of roadways they made just big enough for a dip net to go in it; of course they had places for low water, medium, and high water.

Q. Three different stages?

A. Three or four different stages.

Q. Wouldn't they have to move three or four times, probably many times, during the course of the fishing season, moving their tressels or scaffolds from which they fished back further on the shore, as the waters rose?

223 A. Yes; they have to move back so they could use the dip nets, just as the water comes up they have to move to the next place.

Q. From the point they would be fishing at last week they might be back fifty, seventy-five, or even one hundred yards from that time to this week?

A. Not that far; might be fifteen or twenty, probably—fifteen or twenty feet, I mean.

Q. Where the ground was more sloping might they not in a week's time be compelled to move fifty yards?

A. Wherever there was a long slope.

Q. Do you think, Captain, that fifteen years ago there was even half as much salmon consumed by the Yakima Indians as there was before they were put on the reservation?

A. Of course they don't consume as much now as they did before they were put on the reservation; there must be half any way—half as much as there was fifteen years ago.

Q. A large portion of the Indians have turned to farming and the civilized ways, have they not?

A. Yes; quite a good many.

Q. Those Indians that reside over here in the vicinity of Wisham are Indians that go upon the reservation and make their homes, and that reside there the year round?

A. There are a few that don't go on the reservation at all, and don't want to, but live right around close to the fisheries.

Redirect examination by Mr. ROBERTSON:

Q. Captain, isn't it a fact that the use of fish has decreased among the Indians because they are not able to get any more?

A. That is about the amount of it.

Q. They would consume as much now as ever if they could get it?

A. Yes, sir.

224 Q. How many rapids are there, below this Tumwater fishery?

A. Just below the big eddy?

Q. Between that and the mouth of the river, how many rapids are there?

A. Only one, the Cascades; that is about four miles long.

Q. How far is that from here?

A. Forty-five miles.

Q. How many rapids are there above those rapids within fifty miles?

A. These Dalles Rapids, Salido, John Day's, and Squallie Hook, I think, is the main rapids; then there isn't any more until you get up to Priest Rapids, that is from the mouth of the Snake River, I should judge ninety-five miles.

Q. Are these rapids at the Tumwater fishery the principal rapids along the Columbia in this vicinity?

A. Yes, sir.

Q. They are about a mile and a half long?

A. Yes, sir; a mile and a half or two miles long.

Q. Current is very swift there?

A. Yes; very swift.

Q. You have observed the methods of fishing along the Columbia, have you?

A. Yes.

Q. Why is it that the fishing along these rapids is better than any other place?

A. Current is so great the fish swim along the banks and hug the shore.

Q. They can't swim in the middle of the stream?

A. I suppose they could, though when they are traveling along they hug the shores.

Q. Is the Washington or Oregon shore the places where the most salmon is caught along these rapids?

A. Just about a stand off.

Q. How many fish wheels are there below Winans' fish wheel, do you know?

A. I couldn't say.

225 Q. There are no others on the Washington side at the rapids, are there?

A. Yes; they have got wheels on both sides of the river.

Q. There are no wheels owned by anybody else at Tumwater fishery on the Washington side other than by the Winans?

A. No, sir.

Recross-examination by Mr. MAYS:

Q. Just a little below are there not other wheels?

A. Yes, sir.

Q. There are a number of wheels between here and Salido on the Washington side other than Winans wheels?

A. No; none on the Washington side.

Q. Between here and Salido?

A. There are none, I think, unless they put them in just lately.

Q. Arn't there wheels right here, on this side and below, all along here? That is, below Winans, above, opposite here?

A. Yes.

Q. On the Washington side?

A. Yes.

Q. Wasn't there also a fishing place down here, down the river and about the west end of the Curtis place?

A. Yes; I think there is a couple of wheels down below here.

Q. Wasn't there in olden times fishing places used by the Indians down by the lower end of the Curtis field?

A. I don't remember ever seeing any of them there.

Q. There are fishing wheels on the Washington side still above Winans?

A. Not that I remember, unless they put them in this last year.

Q. Mr. Sufert has a wheel, hasn't he, on the Washington side up about Skin?

A. I don't know.

Q. You say there are more fish caught on the Washington side between here and Salido than on the Oregon side?

A. No, sir; just about as much on the Washington side as on the Oregon side.

Q. Don't you know that at Sufert's fishery on this side there
226 are generally more caught than in all the wheels *than* on the Washington side?

A. He *as* got a better wheel, probably, and a better location because there are just as many salmon come up on the Washington side as on the Oregon side.

Q. There are a great many more caught on the Oregon side than on the Washington side?

A. Not unless they got more and better wheels.

Q. Don't you know the Sufert wheel on the Oregon side catches more than all together on the Washington side?

A. Maybe he has got a better wheel.

Q. Do you know that is a fact?

A. No, sir; I don't know whether he catches more than all the wheels on the Washington side or not, on the river.

A. I don't mean on the river, I mean between here and Salido—that is, on the Washington side?

A. There is more wheels between here and Salido than on the Washington side.

Q. Do you know how many there are on this side?

A. I do not; I know there were more in 1895. I was going up on the train and was standing outside and seen the wheels.

Q. Do you mean to say that you could see all the wheels?

A. I could see most of them; the train stopped and got fish.

Q. Some are not in sight at all?

A. Some are over at the bank.

Q. There is a fish wheel at John Day?

A. There was one there.

Q. There is a fish wheel up the Columbia, above that?

A. Yes; six miles from Lewiston—skow wheel.

Q. Any other places up there?

A. No, sir; that is all I seen.

Q. Do you know where the Wenatcheepam fishery is?

A. No, sir.

227 Q. You know there is such a fishery, don't you?

A. Yes; up at Rock Island. I have been along there in low water and seen where the Indians were camped.

Q. That was a regular fishery?

A. Yes, sir.

Q. About what distance is that from Yakima?

A. I guess that must be about forty or fifty miles.

Q. About how far is it from White Salmon to Yakima?

A. That I don't know; I never traveled on land there.

Q. Do you know how far it is from Cascade to Yakima?

A. No, sir; I don't know; the way the Indians travel I couldn't say.

Q. Do you mean to be understood as saying that the decrease in the consumption of salmon has only been brought about by the fact that the Indians could not get to the fisheries?

A. How is that?

(Question repeated.)

Yes, sir.

Q. Well, what caused the decrease of one-half that you spoke of between the time they were put upon the reservation and 15 years ago?

A. Because there are not so many living.

Q. Not so many Indians?

A. Not so many Indians; of course by that they don't consume as much now as they did then; them that is living if they had a chance they could consume as much as they ever did, if they could get the fish.

Q. A great many of them are living on farms and following civilized methods?

A. Yes; a few of them.

Q. Arn't there a great many?

A. Yes, sir.

Q. Do you mean to say they would consume as much fish as they did at the time the treaty was made?

A. Yes, sir; if they had it to eat they could.

Q. Would they?

A. Yes, sir; they would, because that is their principal food. I can eat salmon three times a day. If I had salmon I would never touch steak only once and a while, probably. I would eat a piece of steak, probably, as big as your hand, but if I could get salmon to eat I would do it three times a day; that is the way with the Indians, if they could get salmon they would not eat any meat.

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Q. Do you know whether these other fisheries, the fisheries up there by Salido, are enclosed on the Washington side or not?

A. No, sir; I don't.

Q. Do you know if there is anything to prevent them from going to those fisheries if they were so disposed?

A. I could not say whether they have been driven away from them or not.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

J. H. COVINGTON, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

Mr. Covington, this the case of the United States vs. Winan Brothers, involving the right of the Indians to fish in common with the whites at the Tumwater fishery, and known by the Indians as Wisham and See-we-pam.

Q. Mr. Covington, what is your age?

A. I am pretty near 78 years old.

Q. How long have you lived in this vicinity?

A. I come here the 13th day of September, 1850, and I am here yet.

Q. Are you familiar with that portion of the Columbia River on the Washington side, between the rapids and the big eddy below the rapids, called by the whites Tumwater fishery?

A. I have traveled up and down the banks there fishing, just like the Indians, for many years.

Q. How many years did you fish there?

A. I come there to settle, and settled on the place where Mr. Wians live, on the 4th day of March, 1877.

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Q. On the Oregon side?

A. Yes, sir.

Q. Well, Mr. Covington, I wish you would tell the court what you know about the extent to which these fisheries were used in the early days and up to the present date, if you know, by the Indians and whites generally.

A. Well, everybody went and fished; I know about that. I did and all of the rest of the Indians went and fished wherever we pleased. Yes; I am an Indian—I don't deny it. I am an Indian; I am not a white man at all.

Q. How many fish, Mr. Covington, in a day with a net and good day's fishing could you catch?

A. I don't think I could tell anywheres close. I saw one man pull out thirteen with a dip net at one time and he got away with them, too; and I fished a whole day and did not get another one. Put it between thirteen and none at one dip.

Q. What would be a good average day's fishing?

A. I could not say as to that—300 or 400 (hundred)—possibly may be more some days, some days less.

Q. How many, Mr. Covington, have you seen fish caught at any time with nets along that fishery on the Washington side?

A. I never see a great many, probably 40 or 50 Indians and white men and all. I never paid any particular attention to it.

Q. Mr. Covington, did any of the white settlers there in early days go there and catch their supply of fish and put them up?

A. Yes; they caught them all along the river—any place and every place. There was one man lived across the river from Winans' place, 200 yards from the rock. That fellow used to have a good many, long years ago—54 and 56. I used to go over there myself; there were heap of clutchmen in that country then—heap of them—whole lot.

Q. How many Indians would go there?

A. That is like asking me how many salmon there are in the sea.

Q. Can't you approximate?

A. No; Indians were very plentiful then. You could buy them very cheap.

230 Q. Could buy salmon very cheap, too, couldn't you?

A. I gave my shirt for one.

Q. Are you acquainted with the trails going into the Wisham and Se-we-paum fisheries?

A. There are so many I couldn't tell you about all of them. They had what they called their riding trails here then—they rode for fame. An Indian would ride with his klutchman, and they used to go off toward that high hill; that was their riding trail.

Q. How deep were those trails—worn down deep in the rocks?

A. No; in the gravel.

Q. It is a gravelly hill?

A. It is gravelly and barren all along the river from the rapids down to the eddy—there is no timber there at all.

Q. It is principally rocks, isn't it?

A. Yes; close to the water all rocks—overflows pretty near every year.

Q. Was this fishery extensively used, and were there a number of fish caught with nets there?

A. Yes; great many fish caught here—all they could use—none for market.

Q. Did you ever use a spear to catch salmon?

A. Not in this State. Back in Kentucky I used to catch suckers.

Q. Do you know of the Indians using spears?

A. Yes; they used a bone spear with a string in the center.

Q. They used to catch fish that way right along?

A. Yes.

Q. Have you been up there recently?

A. Not for four years.

Q. When was the first fence put up there, Mr. Covington?

A. I don't know when that was—what year—it has been quite a few years since the first fence was put up, I think. O. D. Taylor put up the first fence I had any recollection of. He was trying to get the Indians out of there.

231 Q. How many Indian settlements were there along the river on the Washington side?

A. I can't tell you that; little villages, wigwams; one great big village at the head of the rapids.

Q. From your knowledge of the Columbia River, would you say this was the principal place where the old settlers and Indians used to catch their supply of fish?

A. I should say it was; Salido was quite a fishing place.

Q. This was the greatest of all the Columbia River?

A. Greatest to my knowledge.

Q. You have as much knowledge as one living in this part?

A. I won't say about that.

Q. You have been among the Indians and observed their customs?

A. I was born and raised in the Cherokee Nation.

Q. About how many salmon each year would an Indian family put up, providing they got all they wanted?

A. I don't know about that; an Indian eats lots, principally salmon, if he can get it.

Q. Have you any approximate idea of how many?

A. No, I haven't; I couldn't tell that.

Q. Some of the Indians testified that one family carried off as much as ten pack horses loaded with salmon.

A. I couldn't tell, for you know that the Indians makes the salmon their commodity of trade.

Q. Some of the Indians, for instance, couldn't get to the fisheries?

A. No; not near all of them.

Q. What particular point was it that you found the first net fishing along that fishery?

A. I can tell you now from Sufert's wheel, called No. 5, down to my place and below that.

Q. I mean above the Washington side.

A. Along the big eddy, above the big eddy, there was a great difference in the years; some years you couldn't catch what fish you

232 would eat on the other side; other years this side; other years over there; they don't come every year alike.

Q. The Oregon side then was the best side for fishing?

A. Yes.

Q. In a reasonably good year for salmon, assuming that the Indians and whites had a common right of fishery there, and nobody had a right to monopolise it, *how* many families living entirely on salmon could exist on it?

A. Some years we could have fed Lincoln's army with fish; some years nobody.

Q. Generally, however, by staying there all the time and constantly fishing themselves, those that had dip nets could catch enough to run them?

A. Yes.

Q. Do you know anything about Winans blasting the rock there, Mr. Covington?

A. I have seen them blasting a few times.

Q. At that point where they blasted the rock and put in this fish wheel in front of Winans' house.

A. I saw them blasting there. I never was there when they were blasting.

Q. That was about the place, wasn't it, where the main big rock was where you done your principal fishing?

A. Right on this side where that rock comes out.

Q. I mean on the other side where the principal fishing was done.

A. That was one of the first places they commenced dipping with nets; dipped some down at the point.

Q. From that place on to the head of the rapids was the principal fishing?

A. Yes, sir.

Q. How many men could dip there at a time without crowding each other?

A. I couldn't say; there could a good many men dip.

233 Q. When the water was high they would fish with nets, and when the water was low and clear they used spears, didn't they?

A. Yes; that is the way they did it.

Q. The water has got to be pretty low for them to use spears?

A. Yes; certain stages of the water, they do; one a little below middle stage, then there are certain little gulleys go through and the fish runs through them and get out on the rocks.

Q. How long have fish wheels been used for catching fish on the Columbia River?

A. About twelve or thirteen years, I think.

Q. Do you think these fish wheels are destroying the fish?

A. I don't think nothing about that; I can tell you straight; the fish wheels don't hurt the fish one bit; the fish that go up this river never come back. The steelhead may come back; I don't think it.

Q. Now, some Indians don't eat any meat at all, do they?

A. They can not get it; they eat fish.

Q. That is their principal article of food?

A. Yes.

Q. Ever since you have known, you have seen Indians coming over every year since you knew that place?

A. Yes; they have camped all along here ever since I lived here.
Q. They went and got berries in berry time?
A. That I know nothing about; I never heard anything about berries until eight or ten years ago.
Q. You never paid any attention?
A. No; I am a hunter or trapper by trade.
Q. Deer are pretty well cleared out?
A. Never saw any here.
Q. At Mount Adams?
A. No; on that side there never was but a few.
Q. Rather dry and barren?
A. I don't know what is the matter; you won't find any sign of deer, except a few.
234 Q. You have had business dealings with Winan Brothers, have you not?
A. Yes, sir.
Q. You are in some character of business dealings with them now, are you not?
A. Yes; always treated me like a gentleman.
Q. You are the best of friends with the Winans now?
A. Yes.
Q. These gentlemen are your friends?
A. Yes.
Q. Did you sell out any rights to them?
A. I did.
Q. What rights did you sell out?
A. One hundred and twenty-six and one-fifth acres of land to them.
Q. Where is that land?
A. In section thirty-six.
Q. Is that on the fishery tract?
A. Yes; that lower wheel stands on section thirty-six, right opposite big wheel across the river.
Q. Who did you get that land from?
A. My brother-in-law.
Q. What was his name?
A. Simpson.
Q. Who proved up on that land?
A. I couldn't tell you that; I couldn't speak his name if I heard it a hundred times. He was an Italian. I think the land was bought from the State by Gov. Gibbs, of Oregon. Governor Gibbs gave this Italian a receipt for the money and never marked it on the plat; that land lay until last summer before I got a deed for it.
Q. They are still obligated to you on that purchase?
Q. My wife, not me.

Cross-examination by Mr. MAYS:

Q. You say these fish that go up the river never come back. What becomes of them?
235 A. They die.
Q. Except you say steel heads?
A. Yes, sir; steel heads.

By Mr. ROBERTSON:

Q. Some of them have pretty hard time getting over the falls?

A. They wear all their fins off and nose off up to the eyes.

Q. They don't ever get tired and try to go back?

A. I never pumped *them about* that, to see if they got tired or not. For thirty years I have been right on the river, I have never known a fish caught on the upper side of the net. If a fish is going back down the river, all the sein's you would certainly catch some on the upper side of the net.

Q. You are my witness, I will have to cross-examine you on that proposition.

A. Just sock it to me.

Q. You say if the fish wheels catch all the salmon it won't destroy them?

A. I would say that; I didn't say it.

Q. A great many more fish are caught by the fish wheels than without them?

A. There is six feet on the side; we've got six feet to fish on. They can go up the half mile in the middle of the stream if they want to.

Q. Every fish that is taken out of the water tends to diminish the supply of fish?

A. All the females do.

Q. These fish are caught indiscriminately?

A. Yes, sir.

Cross-examination continued by Mr. MAYS:

Q. Do you know what becomes of the fish after they go up the river?

A. They die, I think.

Q. The Winans are considerably indebted to your wife yet, are they not?

A. Some.

236 Q. Do you know what proportion of the fish that are caught in the Columbia River are caught by fish wheels?

A. I do not, Mr. Mays, there are so many ways of catching fish, I couldn't say what proportion would be caught by the wheels; very small proportion, I think, when everything is settled up. Traps and one thing another and gill nets below here is what gets away with the fish, so many of them.

Q. Do you mean to be understood as saying, Mr. Covington, that the Indians have some defined, particular places where they fish at all times, or that the places that they fish changes back on the shore only as the water rises?

A. Of course, they have to go back up and down as the water does.

Q. There is no definite, particular points where they fish all the season?

A. Only certain stages of the water.

Q. One of the Winans lives on this side of the river, at your old place, the other on the other side of the river?

A. That is what I am told; I never was at his house; I am told he lives near the head of the rapids.

Q. Are there only a few certain places or points at which you may catch fish, or are there many points along the river between the big eddy and the upper end of the rapids at which fish may be caught during the different stages of the water?

Q. Of course, that is the way they have to catch them at different stages of the water, below the big eddy. They catch a good many below the eddy, but not so many as they do above, you know, where that peninsula is.

Q. Is there any such a thing as shutting out the fishing places by the construction of the fish wheels, say four wheels over the distance of two miles?

A. Well, I can answer that question only in a way. There is.

Q. I refer to the Washington side; that is, should there be four wheels in that length, would it shut out the fishing privileges?

A. I don't think it would shut them out; I don't know. I know they catch more fish in the upper wheels than the lower.

237 Q. Would the occupation of those four points by the wheels during the fishing season prevent persons from fishing along there over that distance of two miles during the fishing season?

A. A man could go in between the two wheels and fish. There is certain limited distance a man should not go, that is a hundred or two hundred yards below the wheel, but you could put your sein's in two feet above the wheel, that makes no difference; between those two places I should think a man should fish there with impunity.

Q. Take that shore along there from the big eddy to the rapids and bearin' in mind the existence of those four wheels of Mr. Winans, would the fact that they are located on the places where they are prevent the the Indians from fishing in other places between those points?

A. I should think not, without a man objected to their coming too close to him; they could fish if they were allowed the privilege.

Q. There are other points between where the wheels are located where they could fish?

A. I suppose they are, I fished anywhere along the river—when I fished there were no wheels.

Q. If the water was higher than the wheels or lower than the wheels there would be nothing to prevent the Indians from fishing?

A. No; the good time for the Indians to dip is when the water is too low for the wheels to run.

Q. These wheels are not so located that they can catch fish at low-water mark?

A. No; the lower wheel that is there, is sixteen or eighteen feet above low-water mark.

Q. Even when the water is up just so the fish wheel could run, couldn't the Indians fish there above or below it?

A. Yes.

Q. When it is lower they could fish below it, and when it was higher they could fish out there on the shore?

A. Yes; because the bank is sloping.

Q. Do you know what the rise is of the river generally?

A. No, sir; I do not, because I always jumped in and fished when I got ready.

238 Q. Do you know about when the usual annual rise of the river is?

A. It is usually along about this time, little earlier.

Q. Take the river at low-water mark and high-water mark, how much has the river been known to rise?

A. At my place the Government survey said eighty-two feet at the head of the rapids in '85.

Q. If the banks were not precipituous the water would extend out for a long distance, would it not?

A. Yes, sir; I should judge it would. It is a square wall of rock pretty near all along my place on the Oregon side.

Q. How on the Washington side?

A. Square up below the big eddy to above the big eddy.

Q. Take it from where the lower wheel of Winans is to the upper wheel, the shores are receding, are they not?

A. Pretty steep.

Q. Take it where Winans' house is; don't it run out there over where his garden is sometimes, if you know where that is?

A. Yes; runs out, that is below his field, the water runs out there in the field, but at his house it runs back; you couldn't catch a chub there if you had a dip net.

Q. Take it where Winans' second wheel is located, about what distance does the water usually rise and run out beyond it, how much over back towards the main land does it usually rise?

A. It don't rise much if any; that is, the second wheel at the big eddy, is his second wheel on the Washington side; the first is just above the big eddy and the second is further up; the first is opposite his place on the opposite side of the river.

Q. I am asking about the four wheels from the big eddy up?

A. I don't know about that; they have a sloping bank—go back some.

Q. I am asking only about the four wheels commencing above the big eddy and the other one at the upper end of the rapids; take the second one of them, doesn't the water at high-water mark run over and back?

239 A. I think it does; I haven't been at either one since they were built. I have not fished very many days since they were built. Directly after they were built I sold out, and of course haven't been there since. Of course the bank recedes back there quite a lot.

Q. Do you know when the Indians first had horses over there?

A. I hardly know; no; this is pretty far back; I am pretty far back; that is too far back for me; maybe old Adam could tell you.

Q. Take it, say, fifteen years ago, Mr. Covington; did anything like the same number of Indians come to that fishery that did in 1860?

A. No, sir; not so many. There has been a falling off every year, to the best of my knowledge—every year since 1850, because we have been having a little trouble with them; you know that yourself, ever since you were big as a cat, we have had more or less trouble, and killed a few of them; then, there was something else got among them and killed them off, too; something behind their ears; they are going pretty fast.

Q. How is it, Mr. Covington, since they got on the reservation and begun farming, as to their consumption of fish and their coming over to fish?

A. Some years got plenty of fish; some years none; some years heap more than others.

Redirect examination by Mr. ROBERTSON:

Q. You own a fish wheel or two, don't you?

A. I owned one.

Q. You sold out to Mr. Winans?
A. Yes.
Q. Is that the scow wheel?
A. No, sir.
Q. Stationary wheel?
A. Yes, sir.
Q. On the Washington or Oregon side?
A. No, sir; Oregon side. I don't want anything to do with that country; they won't let me have any whiskey over there.

240 Recross-examination by Mr. MAYS:

Q. Are there other fishing places below Winans' fish wheel, just above the big eddy and opposite The Dalles?
A. The lowest down place I know anything about of any Indians fishing on the Washington side is Loomises' wheel.
Q. How far below the big eddy is that?
A. Something like a mile.
Q. Between the big eddy and Loomises' wheel are there any fishing places?
A. Yes, several; not many, *not many*. At certain stages of the water you could fish along certain places at low water; you could fish right opposite from the wheel; right there you could fish some; the banks are square, and very few men in the world could catch a chub there; that is the reason most of the dipping was done on this side; most men cannot fish left-handed, and couldn't catch a chub that long on that side of the river.
Q. Was there any old fishery up above where Winans' are and in the neighborhood of Salido, on the Washington side?
A. I think not; I never see any.
Q. Don't you know there is yet over there an Indian village, just below Salido?
A. I don't know; I never was at it. Do you know where that railroad is? they put kind of an old track there; I think the Northern Pacific done it. I have been up as high as that; that is as high up as I have been on the opposite side.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.
By Mr. ROBERTSON. With the exception of the testimony we expect to take at Vancouver of the records, that is the close of our case.

241 Testimony taken at Vancouver, Washington, on behalf of the plaintiffs, all parties heretofore being present.

JAMES J. O'KANE, witness produced on behalf of plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON:

The matter under investigation at this time is the disputed right of fishery claimed by the Indians in the strip of water known by the whites as the Tumwater fishery and by the Indians as the Wisham and Se-we-paum fisheries, about four miles above The Dalles, on the Washington side of the Columbia River.

Q. Are you familiar with the plat in the land office at Vancouver, Washington, purporting to cover the place in controversy, being T. 2 N., R. 13 east, in T. 2 N., R. 14 east, W. M.?

A. I am.

Q. I will now ask you if you have these plats before you?

A. Yes, sir.

Q. And if your testimony concerning this matter, with reference to the location of the sections and numbers of the entries, is not being made from the official records?

A. Yes, sir.

Q. I will ask you to state what figures appear on the plat in the land office within lot 5, section 19, township 2 north, of range 14 east.

A. The figures representing acreage are 39.50; figures representing the number of the entry are number 1020, and the figure representing the number of the lot is 5.

Q. What do the figures 1020 mean?

A. They represent the number of the cash entry made by William Taylor.

Q. I will ask you if you can refer to the book of original entry and read the official entries with reference to this filing?

A. Yes, sir.

Q. State what book it is.

A. I now have the book called "Register of Certificates," which includes that entry. Under head "Date of certificates," the date is February 26, '69; and under head "Number certificate," number 1020; and under the head "By whom purchased," name William Taylor,
242 residence Klickitat County, W. T.; under "Tract purchased, part of section and section, township and range," lot number 5, section 19, and lots 1, 2, and 3, section 30, township 2 N., R. 14 east; under head "Quantity of acres and hundredths," 99 acres, no hundredths; "Rate per acre—dollars, cents," $1.25; "Amount of purchase money—dollars and cents," $123.75; "Date when patent was received at land office," January 12th, 1870.

Q. State in whose hand writing that is.

A. I don't know; but I think it is written by Joseph M. Fletcher, register. I am not familiar with the hand writing, but I think my father is.

(It is conceded by the attorney for the defendant that the entries are made by a party authorized to make them in due course of business.)

Q. Show upon the plats where the different tracts of land are mentioned in that patent.

A. Lot 5, sec. 19, I have already given, and lots 1, 2, and 3 of sec. 30.

Q. Is that all the land comprised in that entry fronting upon the river?

A. Yes, sir; that is all of the land in that entry.

Q. Now, commencing at lot 3 going down the river, state what is the next entry.

A. The next entry is that of William P. Murphy.

Q. What is the number of that entry?

A. Cash entry No. 357.

Q. Can you turn to the official record of that entry?

A. Yes, sir.

Q. Kindly do so, and testify therefrom.

A. Date of receipt, August 30th, 1864; No. of receipt, 357; by whom purchased, name William P. Murphy; residence, Polk County, Oregon; tract purchased, section or part of section, number of section, number of township and range, lot No. 1, sec. 17, lot No. 2, sec. 19, lots numbered 4 and 5, sec. 30, T. 2 N., R. 14 east, $70.50, $1.25 per acre, $88.12½ cents. The entry was made August 30, 1864. Lot 1, sec. 17, and nearly two miles above lot 5 of section 19, and lot in controversy; lot 2 of section 19 is nearly half a mile above lot 5 of same section and not in controversy.

Q. Read the next.

243 A. Lots numbered 4 and 5 of section 30, down the river from lot 5, section 19, a short distance above and in controversy. Original homestead book shows as follows: Date of receipt, August 6th, 1886; number of receipt, 5852; by whom purchased, name, Orson D. Taylor; residence, The Dalles, Oregon; tract purchased, section or part of section, lots 1, 2, and 3, and northeast quarter southwest quarter section 25, T. No. 2 N., R. 13 east; 164.75 acres; $2.50 per acre.

Q. When was that entry made?

A. August 6, '86.

Q. Homestead entry?

A. Yes, sir; said entry was homesteaded and commuted and appears on cash entry book as follows: When sold, November 11, '87; No. of receipt and certificate, 2542; by whom purchased, name, Orson D. Taylor; residence, The Dalles, Oregon; tract, section, or part of sections, lots 1, 2, and 3, and northeast quarter southwest quarter section 25, T. 2 N., R. 13 east; 160; $2.50 per acre; purchase money, $400.00; patented to Orson D. Taylor, May 10, '89; homestead 5852, commuted sec. 2301, R. S.

Q. Was the entry of Murphy and that of William Taylor a cash purchase?

A. They were cash entries.

Q. That is of William Taylor?

A. William Taylor and William Murphy were cash entries and not homestead or preemption filings; they were not homesteaded I know, but I am not positive about the preemption business; I think certainly they were cash purchases and not preemptions; I know they were not homesteads.

Q. The entry of Orson D. Taylor was a homestead entry commuted to a cash entry?

A. Yes, sir.

Q. How many months after initiated?

A. Well, nearly fifteen months after being initiated; it lacks four days of being fifteen months.

Q. This plat introduced in evidence was made by you, Mr. O'Kane?

244 A. Yes; with the exception of a few extra words put on since I made it.

Q. It is substantially correct, is it?

A. Yes; except what have been put on by the parties during the course of this trial.

Q. Then there is no land unappropriated along the Columbia River

from the point I designate as the big eddy to the point known as the scow fish wheel?

A. There is none.

Q. All that land is embraced in entries?

A. Yes, sir.

Cross-examination by Mr. MAYS:

Q. Does this map that you have prepared purport to show the entries except immediately along the river?

A. No, sir; they wanted the entries about two deep back from the river. No; it doesn't; it is supposed to show about two entries back from the river.

Q. Is the balance of township 2 N., R. 13 east, and T. 2, R. 14 east, except such as indicated on this plat, in evidence, substantially all sold by the Government?

A. The greater part of both townships are. In T. 2, R. 14 east, there are a few pieces left open not subject to filing on account of those orders. The map which I prepared does not purport to give any of the entries except along the river.

Q. Is there any vacant Government land but lot 5, sec. 19, and in same township and bordering on the river? And if so, examine the records and state what.

A. Lot 7 of sec. 15, said township, containing 32 acres; that on the island is vacant; the principal part of sec. 14, fronting on the river is not entered, but is reserved; I say reserved, because I see the following pencil memoranda on the official Government plat:

245 "No entries allowed by white men in this township. G. L. O. June 14, 1888." Also, just below, the following pencil memoranda: "Odd numbered sections except 13, 17, and 19 are subject to entry. See letter C of May 23, 1892."

Q. Are there any signatures to either one of these pencil memorandas?

A. No, sir.

Q. In section twenty, township two north, of range fourteen east, on the official plat, I notice the words "Indian allotment No. 39," and also at other places on the township I notice the same characters and memoranda. What does that mean?

A. It means that those pieces so marked are taken in Indian allotment applications.

Q. What land, if any, does the record show to have been so taken along the river in the township just mentioned?

A. Lot 2 of section 17, by one such entry; lot 4 of sec. 17, lot 1 of sec. 19, and lot 1 of sec. 20 in said township, are taken by another such entry.

Q. About how long since, if you know, have any such entries by allotment been allowed?

A. In March and May, 1896, the above entries were allowed. The first one in this district was made July, 1888.

Q. Examine the plat and state whether or not the record shows such allotments to have been made of the southwest quarter of section 19 in said township.

A. Such an allotment was made on said tract November 11th, 1895.

Q. Do you have any means of knowing when the pencil memorandas were put upon this township plat?

A. I think they were put on soon after the receipt of these letters in this office.

Q. But you have no positive knowledge of that, have you?

A. No, sir; not as to the exact date.

Q. Nor year either?

A. No, sir; I know they both have been on several years; that is as near as I can state.

246 Whose handwriting?

A. The first notation was made by my father, John O'Kane; the second notation was made by Mr. George A. Jolliffe, the present clerk in this office.

Q. How long has he been in this office?

A. About seven years.

Q. Have you any records other than what you have read to the stenographer, which would show when the filing which resulted in the Murphy and two Taylor patents were made?

A. The records as I have gave them, as I understand it, show the true date.

Q. Is that true of the homestead?

A. Yes, sir.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

JOHN F. O'KANE, being duly sworn on behalf of plaintiffs, testified as follows:

Direct examination by Mr. ROBERTSON:

Q. What is your age, occupation, and residence?

A. 73; I have no occupation, you might say; I was formerly receiver of this land office from the 1st of August, '85, to the 1st of December, 1889.

Q. Are you familiar with the records of this land office?

A. Yes, sir.

Q. I will ask you how long you have had the land decisions in the office?

A. Very few came in during my time; they were bound afterwards.

Q. All the circulars were received by this office when issued?

A. I presume so.

Q. I will ask you whether there is not a circular of May 31st, 1894, found in the decisions of the Department of the Interior relative to public land?

A. I couldn't say.

247 Q. I will ask you if you have the decisions of the Department of the Interior relative to public lands for the year '84 and '85?

A. Yes; here is one of May 31, '84.

Q. I will ask you whether there is any circular found in those decisions for the year '84 and '85?

A. Yes, sir; page 371, volume 3, book covering July 18, 1884, to June, 1885.

"INDIAN OCCUPANTS.

"Circular.

"Commissioner McFarland to Registers and Receivers, May 31, '94.

"Information having been received from the War Department of attempts of white men to dispossess nonreservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

"In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain, by whatever means may be at your command, whether any lands in your district are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries of filing upon any such lands. When the fact of Indian occupation is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

"Approved May 31, 1894, by Secretary Teller."

(The foregoing circular copied into the record from the volume above referred to by stenographer, as per agreement of counsel.)

248 Q. I ask you if there is not a telegram on file in this office received during your term of office in the regular course of business from T. J. Anderson, Acting Commissioner of the General Land Office, directing the refusal of applications to enter lands in the township, ranges, and sections near Tumwater fishery?

A. There is.

Mr. ROBERTSON. I now offer this telegram in evidence as plaintiff's Exhibit B.

Q. I now ask you if there is in the records of this office a letter dated June 14, 1888, from T. J. Anderson, Acting Commissioner of the General Land Office, relative to the entry of lands along the Tumwater fishery.

A. I couldn't say whether the Tumwater fishery; this, of course, has reference to T. 2 N., R. 13 and 14 and 15. I presume that is near the Tumwater, most likely.

Q. I will ask you whether you have a letter dated May 25, 1888, from William F. Vilas, Secretary of the Interior; and also if you have a letter dated September 24th, 1888, from A. B. Upshaw, Acting Commissioner of the General Land Office, relating *the* the land in the section and township you have just referred to?

A. Yes; sir.

Mr. ROBERTSON. I now offer these letters in evidence as plaintiff's Exhibit C.

Q. When were these letters received?

A. From eight to ten days after they were mailed in Washington.

(It is agreed that copies of the above letters may be substituted for the originals.)

Cross-examination by Mr. MAYS:

Q. Mr. O'Kane, you don't claim to have any personal recollection about the way these letters or telegrams were received?

A. I know they were received; I couldn't tell the time exactly.

249 Q. You have no personal recollection about the exact time?

A. No.

Q. You simply suppose they were received in the ordinary time, in the usual course of transmission?

A. Yes, sir.

Q. This circular you have referred to in that volume of the land-office decisions, have you any recollection as to when or whether the original instructions were received there?

A. That I couldn't say, because that was a little before I came into the land office. In the first place, for the first six months after I come into the land office, myself and the then register were not on speaking terms; there was very little intercourse between us, and the business between the two offices was all transacted by the clerk.

Q. What date did you go into the land office?

A. First of August, 1885.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

JAMES J. O'KANE, recalled for cross-examination.

By Mr. MAYS:

Q. I call you' attention to township 2 N., R. 13 east, and to a writing thereon, as follows, in red ink: "Tracts enclosed with dotted lines are Indian lands and not subject to entry by the whites. See Commissioner's letter C of June 14th, 1888, and May 23rd, 1892." You may examine that plat and see whether or not any dotted lines surround the entry of Orson D. Taylor.

A. They do not.

Q. You may state whether or not this red-ink writing which I have quoted is all in the same handwriting.

A. It is.

Q. In whose writing?

A. That of George A. Jolliff, clerk.

Q. How late was he clerk?

A. He is clerk here now.

250 Testimony of defendants submitted at The Dalles, Oregon.

L. W. CURTIS, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, and residence.

A. L. W. Curtis; 37 years old; live over across the Columbia, four miles north of The Dalles.

Q. What business or occupation are you engaged in?

A. Farmer and stock raiser.

Q. What, if any, official position did you hold in Washington at any time?

A. I was a member of the lower house of the legislature two years ago.

Q. How long have you resided over there?

A. Born and raised there.

Q. How far from where you were born and raised is it to the fisheries, to what is called the Winan fisheries?

A. I should judge, in a direct line, between five and six miles.

Q. Were you during the time since you were a boy familiar with the general typography and objects in the vicinity of these fisheries?

A. Yes, sir. After I was of an age I could ride; when I was a boy I used to ride around over these hills for stock; used to go very frequently.

Q. During the time when you were a boy and after you grew up, do you remember of observing the Indian trails leading to the Winan fishery, and in that connection I will ask you (1) if you know the location of the Indian village which is now there?

A. Yes, sir. There are two of those villages, or were the last time I was there. They are near each other, probably three-fourths of a mile apart.

Q. Do you know what trails or trail—old trail of the Indians—which led to that locality?

A. Yes, sir.

251 Q. How many were there?

A. There was a trail that led from the camp that branched off after it got a short distance from there; there was one branch that went near our house. This trail that run near our house was White Salmon. Another trail was Colwash trail. The Colwash trail ran north, in a general direction it ran north.

Q. What other trail, if any, was there, or what direction did any other trail run?

A. This main Colwash trail, as it was called, when it got a short distance from the camp, came out in an open space in a general direction north until it reached a sort of flat. These fisheries were in a character of country that we would call rim rock. In passing from these fisheries they would run beneath this rim rock, then these trails continued north to Mount Adams; another ran to the reservation. After they got three-fourths of a mile one branched and ran up to the Salido fishery or Skamia fishery, as it was called. Then there was another trail that led west past our house; those were the four main trails by which you reached the camp.

Q. Did they run together before they reached the Indian village?

A. Yes; a short distance from the village, one-half mile from the village—most northerly village—because they came out from the rim rock through a narrow passage.

Q. So that all of the trails come together just outside of this narrow passage?

A. Yes, sir.

Q. From there one trail to the Indian village?

A. Yes; just one trail; no other way of getting there.

Q. About how far out from the river would it be to where these trails verged into one trail?

A. In extreme high water it would nearly reach the trail, in very low water it would be nearly a mile.

252 Q. Would that be the river on the south, or the river on the east?

A. The river makes a bend, and runs in a general direction a little west of south.

Q. Where would that be with reference to the head of the rapids—that bend?

A. The bend in the river is northeast from the head of the rapids about a mile. This flat lies between the head of the rapids and the bend of the river. The trail leading from the Indian camp runs in a general course north for one-half of a mile from the camp. These trails diverge after you pass out from below therim rock—you get into a sort of an opening of about a hundred and fifty acres; in this place these trails diverge.

Q. Where they all divide?

A. Yes, sir; these trails in traveling from the fishery to their berry patches and the reservation or other points take a direct course, and before they all diverge and go in different directions there were some times fifty yards from the extreme outside to the extreme outside, and a number of small trails. These trails followed in that sort of shape for twenty miles across the country; they could be traced beyond and across the hills; they are very plain trails.

Q. How was the use of fish by the Indians effected, if at all, by the placing of the Indians upon the reservation?

A. I know nothing of that. I couldn't say anything about that any more than I could see the Indians did not remain in the vicinity so long. They would come in and camp and go away from there. There was not as many during the twelve months. There were not so many all the time. I don't remember when they first went on the reservation. This is the last fifteen or twenty years I could notice. The average number of Indians has decreased.

Q. Do you know to which of the villages that you have referred to this Colwash, the result of the four different trails, and the trail made by the four different trails, led to?

253 A. It led first to the more northerly village, the other went further up the stream, it was simply a continuation of the trail. These two villages are upon different elevations, the upper one is above the rim rock; then when you go past that you are where the second one is located, in going out there is no other means of ingress or egress except it is necessary to go down in the flat or plateau upon which the upper village is located.

Q. Do you know whether this Colwash trail has ever been fenced up?

A. I think not.

Q. What would you say as to whether the main trail or road leading from that Indian village towards the reservation or over the mountain north has been fenced up?

A. After you get out beyond that village that trail is all fenced up, it runs in a general direction northeast, that is all fenced up, after you get away from the village any distance.

Q. What I want to get at is whether there is an open road from that village up the hill towards the reservation?

A. There is an opening from this Indian village out to the county road, it is not out on the line which they formerly traveled to the reservation.

Q. Do you know whether from that county road to the Indian village or some of these trails there is a wagon road?

A. Yes, sir; that is on the branch that formerly led to White Salmon, that is the only one of those four trails that is visible, that wagon road.

Q. That goes through the pass.

A. Yes, it goes down to the points where these trails diverge, the other one goes up a steep declivity, this trail which led to White Salmon, the rise is more gradual, there is a wagon road leading down White Salmon to the old trail, down to the Colwash road.

Cross-examination by Mr. ROBERTSON:

Q. Mr. Curtis, how far from the river was it that these trails diverged?

A. Well, as I said, in extreme high water, not very far; in low
254 water it was probably a quarter of a mile.

Q. How far did this trail run from the point where it branched to the first village?

A. About, I should judge, three-eighths of a mile.

Q. How far was it from the upper to the lower village?

A. The way you have to travel with a horse, one-half or three-quarters of a mile.

Q. This trail strikes the river at the northern village and ran down the river?

A. It struck the river above the northerly village and ran down the river to the southerly village.

Q. Where is Winans' house?

A. It is below the old village where it used to stand, not far.

Q. When did you see these villages last?

A. Two years ago I was at the upper one.

Q. There were houses at both places at that time?

A. I wouldn't be positive about the lower, I think there were, there were at the upper.

Q. Time before the last?

A. Same time at both, I suppose.

Q. When was that?

A. Three to five years ago.

Q. Indian houses there?

A. Yes; temporary houses.

Q. You say a long time ago the Indians used to stay at those points all the year round?

A. No, not all the year round, not in these particular points where their village is located, their immediate vicinity, if you understand the habits of the Indians, in the summer time they build houses to dry fish in, and in the fall tear that down and go to the berry patch, and when they return they select their winter quarters and build teepees—probably you have seen their teepees—and in these they live in the winter
255 time, I wouldn't wish to be understood to say they would remain in the exact place where they located in the summer time.

Q. I show you a correct plat here of the vicinity of the fishery. Do you understand that plat?

A. I understand it in a general way; there is the big eddy.

Q. Yes.

A. That is the lower fish wheel, and this is the upper. That map, probably, was made in extreme low water, and in extreme high water the river would come across here and constitute the river in a general way; run in a southwesterly direction.

Q. Now, I will ask you if you can take a pencil and mark how that trail runs, or did run when you saw it. Take your time, Mr. Curtis; I would like to get this as near as possible.

A. If I should recollect this, it would be only in a general way; and the stream ran over this levy; here are the narrows in the stream which in low water are one hundred feet across. This is the channel, here, between Oregon and Washington. In low water that is very narrow—one hundred feet. That index point, one hundred feet below the fishery, that is called the fish wheel. Here the stream is very narrow; in an ordinary stage of water the stream runs across there. The Indian village I would locate here; it is below lot four in lot five, near the upper side of lot five; in a general way I should locate the village there; the trail here ran in a general direction to the river. The river runs, assuming the Indian village to be where I located it, at the small point marked X in black ink. In Bill Charley's tract in a general way the trail ran a little northeast, generally across that to the stream about three-eighths to a quarter of a mile, reaching out here in this flat on the reservation trail. We go out in that direction still quite a ways. One way to the upper fishery, somewhere near that railroad is; the reservation trail would keep on that direction to the trail that comes to the berry patch; we bear off some northwest, make a point as the dividing point—that would be for the reservation; the other trail diverges back here in this direction
253 to Mount Adams. Now, you understand, the typography is this: There is a cliff runs alongside of this trail; there is a cliff here anything from a hundred to a hundred and fifty feet high; this trail follows along beneath this cliff to rim rock and White Salmon, a branch of this main trail; this Colwash trail passes out through this rim rock, a past that cliff.

Q. Now, can Indians travel a trail from the reservation to the fishery?

A. No, sir; they can not.

Q. When was that fenced in?

A. Fenced in for twenty-five years. The Indians themselves have it fenced in close to the fishery.

Q. What Indians?

A. I think Bill Charley himself. John Simpson—his place is fenced in.

Q. Next to the river?

A. No; back on the hill. I don't know the subdivisions; they can be found on the plat.

Q. How wide is the Columbia River, along this fishery, in extreme low water?

A. Only a couple of hundred feet, some places. It is not a fishery in extreme low water.

Q. Did the whites ever fish there with nets before the fish wheel was put in?

A. I think they did; yes, sir.

Q. Do you know whether or not there was any objection or opposition on the part of the white persons living in the vicinity of these fisheries to the operation of the fish wheels and the exclusion of the whites from the fisheries?

A. Never heard any objections.

Q. Assuming that the white settlers of Washington have the same rights that the Indians have, and the Indians have the right to fish along this fishery, and that fish wheels are unlawful and in violation of the common right of fishery claimed to be possessed by the Indians and white settlers, would you say under these circumstances that the whites would not fish at that fishery during the fishing season?

257 A. If I understand you, do you mean to ask me the question whether those wheels as they are operated would——

(Question read.)

A. If I were to assume that the wheels were operated in violation of the law and I were to assume that I had the same right to fish that the Indians have, assuming the same of course, I would want the wheels removed.

Q. This case is brought to establish the right of fishery as claimed by the Indians in common with the white settlers at this place as the customary fishery, and I ask you whether or not this is the customary fishery and is not the exclusive property of Winans or anybody else, would it be a general resort for fishing during the fishing season?

A. The farmers don't make it the practice of going there to fish; they would go there to catch a few, half a dozen or so and go home; they wouldn't resort there to catch fish in any considerable numbers. I have known them to go there since Mr. Winan have been there. I have never known them to buy any. My judgment is there wouldn't be a great many go there to fish.

Q. You never fished in your life there?

A. No, sir.

Q. You don't know anything about catching any?

A. Seen several caught.

Q. You don't know anything about fishing with a net?

A. I have seen it done with a net?

Q. What is the best place to catch with a net?

A. Not too strong a current.

Q. What is a favorable condition?

A. I do not believe I could explain that; if you had it here I could tell you; it is necessary that you should have an upstream current,

the fish in swimming up the stream, and the net should be spread so that the fish would go into the net.

Q. You don't claim to be an expert net fisher?

A. No, sir.

258 Q. You know how many fish a wheel can catch?

A. No, sir.

Q. How many an Indian will catch?

A. No, sir.

Q. You don't mean to state the extent to which white persons did resort to this fishery before these wheels were put there and this was fenced in?

A. There were no considerable numbers. I saw a few there. I doubt if there were ever more than twenty went there in one season.

Q. Why do you doubt it?

A. I have been there frequently gathering stock. I never saw them there.

Q. You did see lots of Indians?

A. Yes, sir.

Q. You knew that was an Indian fishery?

A. Yes, sir; whether it was an Indian fishery or not I didn't know positively.

Q. You knew that was a fishery from time immemorial?

A. I knew a man by the name of Taylor had a fishery.

Q. Didn't you know that was an Indian fishery from time immemorial?

A. It was for him.

Q. From the evidences of those trails you say ran twenty miles, sometimes fifty yards in extent, you would judge Indians traveled those trails hundred of years?

A. Yes, sir.

Q. You are a keen observer of the localities and conditions and typography of the country?

A. Yes, sir.

Q. You observed one of these trails ran up to the berry patch at Mount Adams?

A. Yes, sir.

Q. You ever been there?

A. Yes, sir.

Q. What kind of berries?

A. Huckleberries.

259 Q. A number of Indians went there?

A. Yes, sir; these trails go to the berry patch, to the reservation, and White Salmon from the fishery.

Q. They all gather together at this fishery?

A. Yes, sir; just outside.

Q. From what you know of that fishery, you would have no hesitancy in saying that they gathered there to get fish?

A. I should judge probably the trail from the Satus on the reservation they traveled to get fish, after they got their fish went out in the fall to gather berries.

Q. This was so plainly marked that all stockmen and everybody has a general name for that trail?
A. It was known as the Colwash trail.
Q. You seem to be familiar with the ownership of this fishery?
A. Yes, sir.
Q. What makes you so familiar with it?
A. My father loaned Mr. Taylor the money to buy it and took a mortgage on the land for the money.
Q. You are also intimately acquainted with Mr. Winan?
A. Not very familiar; I meet them in the course of business often.

Redirect examination by Mr. MAYS:

Q. I would like to ask this question as upon direct examination.
Mr. ROBERTSON. I have no objections.
Q. Do you know the fishery which is called the Winan fishery?
A. Yes, sir.
Q. You mentioned that by some other name?
A. Skamia fishery.
Q. Where is that with reference to Salido?
A. Little below.
Q. What, if anything, is there there in the way of an Indian village?
A. There is one there, probably as much as the Tumwater fishery, or was some years ago.
260 Q. Do you know anything about the number of fish wheels upon the river?
A. I do not know.
Q. Do you know whether there are any still above Winans, on the other side?
A. There were two in '94; if they are still standing, I couldn't say.
Q. Do you know if there are a number below?
A. Yes; several.
Q. Different points below?
A. Yes, sir.
Q. Along down the river to the Cascades and other points?
A. Yes, sir.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

V. T. COOK, a witness called and sworn on behalf of defendants, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, residence, and occupation.
A. V. T. Cook; age, 47; Rockland, Washington; occupation, farmer.
Q. Where do you reside over there, with reference to Winans' fishery?
A. Between three and four miles northeast.
Q. How long have you resided there?
A. About fifteen years.
Q. Do you know where the Indian village is located, over there by Winans' fishery?
A. Yes, sir; I do.

Q. Are you familiar with the typography of the country, and also any old trails in that locality?

A. Yes, sir; by traveling over them.

Q. I wish you would state as nearly as you can any old trails there are over there—Indian trails with reference to and approaching this Winans fishery.

261 A. There is a trail that goes from the Goldendale road, called the Colwash trail, that goes directly down to the river; there are various trails that meet there at the rim rock, and the trail along the river and passed Winans' house.

Q. Is there any trail coming down the river towards the Colwash trail, connected with the Colwash trail?

A. There are some trails that come from the reservation across the trails northeast, coming to the Colwash trail, all ending down at the river.

Q. Do you mean at the river or at the village?

A. Village, just outside the village, really. You see there is one that goes from up the river, coming down the river, northeast direction; comes down to the river.

Q. From what locality, with reference to Salido?

A. It would lead you to Salido; there is one verges from that.

Q. Where does it go?

A. North. Then there is another one further west of that, that would lead north.

Q. Any other still further west?

A. Not that I know of.

Q. Where do these trails come together, at any point along there?

A. They all come together in an open space that is called the Colwash bottom.

Q. Where is that with reference to the Indian village that is there?

A. You have to go through Colwash bottom to get to the village.

Q. I understand you they all diverge and become one there at the Colwash bottom and lead on to the Indian village?

A. There are quite a number of trails; they all lead to the Indian village.

Q. All the trails are made up of a series of trails?

A. Series of trails towards the Indian village.

Q. As you might term it, when they finish do they come together or not, before they reach the Indian village—that is, the one coming down from towards Salido, those coming over the top of the mountain, do they diverge before reaching the Indian village?

262 A. The distance is so little you can't count it; it is like a whole lot of trails coming into 160 acres; at the corner is your village.

Q. Do you know whether there is a pass there; rim rock on one side—sort of an narrow peninsula?

A. Yes, sir.

Q. You may state if the roads diverge about that point.

A. Yes, sir.

Q. You may state whether they all pass through that pass.

A. You have to go through that pass to or from the village.

Cross-examination by Mr. ROBERTSON:

Q. Have you lived in the West pretty nearly all your life?
A. No, sir.
Q. How long have you lived in the West?
A. Sixteen years.
Q. Have you traveled over the mountains a good deal?
A. Yes, sir.
Q. Are you familiar with the Indian trails?
A. Yes, sir; by observing them.
Q. By your observing these Indian trails, what would you say with reference to the amount of travel these trails have had?
A. Look as though they had been used considerable.
Q. You would think they had been used for years?
A. Yes, sir; the rock has been cut into where they have been used, defining them, I have noticed that.
Q. You say it passed over rocky places?
A. Well, in going up some of these rocks there is a trail that is made by horses; I was thinking when you asked the question about right on the river.
Q. So the wearing down of these rocks by the horses, you would think it had been traveled; it had been extensively traveled?
A. Yes.
263 Q. You never saw an Indian trail that had been traveled any more than that?
A. No, sir.
Q. It is known all over this country, isn't it?
A. Yes, sir; it is known as the Colwash trail.
Q. Have you traveled it any distance?
A. Yes, sir.
Q. Been to the reservation?
A. Yes, sir.
Q. Been to the Mount Adams berry patch?
A. No, sir.
Q. All the way this trail is a well defined trail?
A. Can't say that I traveled the road. The only thing I know is here in the immediate vicinity.
Q. That is pretty well fenced up, isn't it, between the upper and lower fishery?
A. No; the trails are not; they are in a better fix now than they used to be.
Q. Can you go from the upper to the lower Indian village along the river on the trail without going through Winans' fence?
A. Yes, sir.
Q. How?
A. Wagon.
Q. Is it fenced in between the wagon road and the river?
A. There is a fence between the wagon road and the river.
Q. Can you get to the river on these trails at any point between the upper point of the rapids down to the eddy? Can you get to the river anywhere on that trail?
A. In the big eddy?

Q. From the big eddy to the upper part of the rapids, can you get to the river on that trail?

A. I can get to the big eddy; up above there is fenced.

264 Q. What do you call these rapids; what is this fishery called by the whites?

A. It is the Tumwater fishery.

Q. This is the head of navigation on the Columbia River?

A. Yes, sir.

Q. The rapids are what prevents boats going up any farther?

A. Yes, sir.

Q. Now in high water it is impossible to navigate a small boat in those rapids?

A. Yes, sir.

Q. The water raises there so that it makes it impossible for any small boat to go against the current?

A. Yes, sir.

Q. Now, also, would it not make it impossible for the fish or anything that swam to go against the current, unless it sought shallow places or channels?

A. These channels the fish go in are generally close to the shore.

Q. The principal rush of the waters is out in the middle of the river?

A. Yes, sir.

Q. There are rocks and boulders and everything else that prevents the clear flow of the water along that point—showing at high water, and both high and low water?

A. Yes, sir.

Q. Is there below that any other place similar in character with reference to the rush and condition of the water to this Tumwater fishery?

A. Not that I know of.

Q. So this is a striking point, is it, along the Columbia River, that would attract the attention of anyone on account of the swiftness of the current and condition of the river?

A. Yes, sir.

Q. You would call these falls a rapids?

A. Yes, sir.

265 Redirect examination by Mr. MAYS:

Q. There are other rapids above Salido?

A. Yes, sir; not to the same extent as these.

Q. Not quite so long?

A. No, sir.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

The testimony of the two preceding witnesses was taken out of order at the time of the offering of plaintiffs' testimony upon agreement of all parties.

The following testimony upon behalf of the plaintiff was taken at The Dalles, Oregon, beginning May 20th, all parties being present.

FRANK P. TAYLOR, a witness called and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. MAYS:

Q. How long have you resided in The Dalles?

A. I reside out about two and a half miles; my last residence has been about seven years.

Q. Where did you move from when you came to this side of the river?

A. From opposite here—in Washington—called Rockland precinct.

Q. How long did you reside over there?

A. My last residence there was about twelve years.

Q. How long had you resided before that time there?

A. About, between six and seven years.

Q. How long was the interim between your residence?

A. Seven years.

Q. How long then have you been intimately acquainted over there?

A. Came there in '62—about thirty-five years.

Q. How old are you?

A. Forty-five past.

266 Q. Then when you first lived over there you were but eleven years old?

A. About eleven.

Q. About how far from what is called the Wisham fishery did you live while you were living over there in that neighborhood?

A. First residence, about a mile and a half; second, about a mile.

Q. While living there did you become acquainted with the general typography and natural objects of that locality?

A. Yes, sir; I became familiar with the typography of the country, location, etc.

Q. Did you know what were the old Indian trails in that locality at the time when you first lived there?

A. I did; yes, sir.

Q. Was there any settlement to amount to anything in Rockland precinct when you first lived there?

A. There were six settlers I believe in this precinct.

Q. Do you know a point some distance north and northerly from the Wisham fishery where there is a pass that the trails go through?

A. I know different passes; there is one near the approach of the Wisham fisheries; it is what we called the upper end of the bluffs, from the southern boundary of what we call Colwash bottom; there is a narrow pass through where the trails all concentrate.

Q. About how far from the Indian village would that pass be?

A. Well, from the upper village it is not to exceed four hundred yards or a quarter of a mile; something like that.

Q. Is there any other means of ingress or egress to that bottom other than through that pass?

A. Not from those villages. There is a perpendicular bluff immediately west of the villages.

Q. You may state whether or not the trails which led into that fishery that were used by the Indians came through that pass or not?

A. They came right through that pass and concentrated right outside of the pass a short distance.

267 Q. To what different directions or places did the fishery trails lead farther north of the pass?

A. The one following the Columbia River led in a northeasterly direction up the river; one led in a—in fact, there were two led in a northeasterly direction, one following the meanderings of the river, one across the Klickitat Pass; then there was one in a northerly direction, called the Wacagus trail, crossing the Klickitat. There was another one down the river, westerly direction, following the meanderings of the river towards the Cascade and White Salmon and the berry patch.

Q. You may state whether or not all those trails scattered before going into this pass, as you referred to.

A. Yes; in Colwash bottom, with a few exceptions, some would strike off and lead towards The Dalles and points on the Columbia leading towards those fisheries. They all concentrated just outside of this pass.

Q. Were those well-defined trails?

A. Yes.

Q. Describe them.

A. They were well-beaten trails when they crossed over rocks; they were impressions on the rocks indicating they had been traveled a great deal. At places they were forty or fifty feet wide, and at places narrowed down to two or three, single trails following directly along the same direction. The habits of the Indians were to ride single file; the trails would not be more than two or three feet wide at places for a mile or so; one horse could travel at a time.

Q. What is the fact as to the number of Indians which came over there to those villages with reference to their increase or decrease during the years that you were in that locality?

A. I have seen, in sixty-two or three, what I judged to be a thousand or twelve hundred Indians collected during their horse-racing season. During '68–9, after they were removed to the different reservations, they diminished. I never saw, I don't think, collected together in those last years over two hundred Indians, hardly so many as that, large and small—maybe a couple of hundred.

268 Q. What were the facts with reference to the numbers that came there during the last few years of your residence there?

A. I never saw over seventy-five to one hundred in all, big and little, the last seven years I was there; the last three or four years I was there there wasn't more than fifteen or twenty; four or five, I think, made their permanent home there.

Q. About how many souls would they number?

A. Dozen; maybe fifteen.

Q. At what time, if ever, was there a fence put across this pass so as to prevent the Indians going in there?

A. I enclosed it in 1882.

Q. Are you any relation to O. D. Taylor?

A. None whatever.

Q. About how long did you maintain the fences there?

A. About four years—'86 when I sold out.

Q. What effect did that have as to preventing ingress and egress through that pass during that time?

A. I stopped anyone from trespassing on the ground, with the exception of a few; there were a few of these old fellows I gave a permit to live on the ground and fish.

Q. Was there any ingress or egress in there of the Indians other than they which were permitted by you?

A. Occasionally they would break down the fence and trespass; occasionally would have one of them fined for trespass.

Q. Otherwise it was with your consent?

A. Yes; those that lived there remained there.

Q. Were these Indians that were permitted to live in there—do you know anything from what they said as to whether they belonged to the Yakima Nation or not?

A. They claimed to be the Colwash tribe of Indians, born and raised there.

269 Q. What was this trail generally called, leading to the villages?

A. Colwash; after they spread out had other different names; Skawaga, Klickitat, and White Salmon trail.

Q. Are you familiar with the typography of the shores and the land immediately adjoining the shores there at the Wisham fishery, up above and below?

A. Pretty well.

Q. Have you frequently been there; ever fished there?

A. Yes; I maintained a fishery there for four or five years.

Q. Was that while you owned the land there?

A. Yes, sir.

Q. What is the character of the shore line along there with reference to be abrupt or receding from the river?

A. It varies; there are places that are perpendicular from low water to extreme high water; again there are approaches from low water to extreme high water that is gradual.

Q. What is the general character as to being receding or otherwise?

A. It lays in what we call shelves or benches, from five to ten feet high, running parallel with the river, is the general character of the shores.

Q. Do you know the location where the two fish wheels of Winans are, in the immediate vicinity of where his residence is?

A. Yes, sir.

Q. How was it with reference to the Indians taking fish there, as to their having certain definite points where they fished during the fishing season, or as to their having to move back as the water rose?

A. Well, there at the three lower wheels, commencing at the big eddy, the approaches are gradual; they would have to move as the water rose and move back as the water receded until you come or go above the third wheel; there the bluffs set in perpendicular after about one hundred and fifty yards; I will say for seventy-five yards above this third wheel the approaches are so they fish there different stages of the water.

270 Q. Are there any wheels along where this perpendicular is, between the third and fourth wheels?

A. No wheels there.

Q. Do the wheels occupy the fishing places of the Indians there?

A. Not the fishing places; it occupies one of the fishing places at certain stages of the water; it occupies that certain stage. There would be different fishing places as the water was lower or higher. The water has to raise there from twelve to fifteen feet before they can do any fish-

ing; then they can fish, but until the water is fifteen or twenty feet higher up, until this middle stage, it gets back of the wheel; below the wheel it runs over the bench.

Q. Then here it is below the wheels and then above the wheels; would it be possible if they were not there for the Indians to fish at this bluff occupied by the wheels at all?

A. They can fish below the wheels down the stream and up the stream; as it is now they can fish towards the river from the wheel at different stages; they can along up the river as it stands now.

Q. Take it when the water is not up to the wheel and again when the water is above the wheel, would it be possible for them to fish where the wheel is located

A. No, sir; the water would be twenty-five or thirty feet deep at times where the wheel is located.

Q. Could they, by any possible means, fish there at that time?

A. No, sir; there, whenever there is fishing by scaffolds at that particular point, they use scaffolds twenty or thirty feet long, project out six or eight feet; they have to move back as the water rises.

Q. Take it when the depth of the water was such that it was up to the fish wheels, so that they might operate them; would that fact prevent the Indians fishing either down the river from the fish wheels or above the river from the fish wheels?

A. No; It wouldn't prevent them from fishing down the river or even above at the stage of water when it would reach these wheels; that is, other points near by.

271 Q. You spoke of two villages; where was the other village aside from the one the trail first reaches, the Wisham village?

A. There was three villages; the first one is about three hundred yards below what is called the upper Colwash village, there again one of those benches; the other was three hundred yards below, near where this wheel is; there never was more than three or four houses put up at that point, that is, teepees.

Q. Were there any other fishing places used by the Indians in the early time this side of Winans lower wheel, just above the big eddy and between that and opposite The Dalles?

A. Yes; there are fisheries where they fished in the early days; they fished of late years; when I was living over there the last time they were still fishing at early stages of the water, about a mile above the Rock Island Ferry, here opposite The Dalles; they fished at what was called the Rock, on the school land, when the water was high.

Q. Was that a regular fishery? Were there any regular fisheries over there?

A. Where I have spoken about, opposite the Winans?

Q. Yes.

A. Every season.

Q. Were there any villages around there?

A. Yes; the Laxon place, a mile above here, on the Washington side.

Q. How far?

A. A mile or over. They were fishing down below The Dalles here on place.

Q. Do you know what Indians were fishing at the Curtis place and below the big eddy?

A. I don't know what certain ones; there were different ones that would fish. I have seen them carrying fish and seen them fish at this place. There are more fish caught at the lake fishery than any other point at certain stages of the water.

272 Q. Were there any fisheries above where Winans' fish wheel is during the early days?

A. Yes, sir.

Q. What place?

A. What we call the Johnson fishery, about a mile and a half above the fish wheel; there were several points there they fished at; there was a narrows there a mile and a half above the fish wheel similar to these; there was considerable fishing done there; at high water they come back and fish there.

Q. When was that?

A. Every season; they fish there yet.

Q. Are there any fisheries still above the Johnson fishery and this place?

A. Tumwater and Salido rapids.

Q. What was that called—Skamia or Tumwater fishery?

A. Colwash, this first fishery.

Q. Did the Skamia tribe fish at these other fisheries?

A. The only other fishery, the Johnson, that was Skamia fishery and Salido.

Q. Were any of these down here ever called Skamia or Skin fishery?

A. Not in my time.

Q. Were you intimate, more or less, with the Indians?

A. Yes; they worked for me a good deal herding stock one way and another. I think I knew most every Indian.

Q. Speak jargon well?

A. Yes; I used to speak it very well.

Q. Were there any villages or houses at these fisheries above where the Winans' are now?

A. They used to erect their houses at the Johnson fishery.

Q. Are there any temporary teepees still standing at the Skamia fishery?

A. There were two years ago; remnant of houses there.

Q. Have the Indians free means of ingress and egress at this time, and have they had all along, to what you speak of as the Johnson fishery and Skamia fishery?

273 A. They are enclosed.

Q. Are there any roads leading there now, and have there been for some time?

A. Yes; the Indians use an old trail there.

Q. Or have they abandoned their trails?

A. There is a wagon road—there is a better road there—it was a rock, rough trail in early days, and the whites blasted out those rocky places.

Q. Were there any fisheries below what you speak of as the fishery at the Curtis field on down the river?

A. Fishery at White Salmon.

Q. Any below there?
A. Yes; at Cascade.
Q. Do you know whether they are enclosed?
A. They were not when I was down four years ago.
Q. Have you ever heard of them being enclosed?
A. No; I have not.

Cross-examination by Mr. ROBERTSON:

Q. Mr. Taylor, your name is what?
A. Frank P. Taylor.
Q. Mr. Taylor, you at one time owned some land along this fishery?
A. Yes, sir.
Q. From whom did you acquire this land?
A. Well, from two or three different parties. From William P. Murphy and the heirs of William Taylor, and Hugh McNarie.
Q. From Orson D. Taylor?
A. No, sir.
Q. Who owned the land patented by Orson D. Taylor at the time you left there?
A. That was patented after I left there.
Q. At the time you were there then Orson D. Taylor didn't have a patent for his land?
A. The homestead you have reference to?
274 Q. Yes.
A. No; he had not.
Q. Do you remember when that patent was issued?
A. It must have been issued about '92 or 3; not earlier than that.
Q. Do you remember anything about an Indian village being removed—some houses removed there by O. D. Taylor—about eight years ago?
A. No; I do not remember.
Q. Do you remember that houses did stand at or about the place where Winans' house now is?
A. There was one or two little shacks put up there; yes, sir.
Q. How wide a strip along the river did you acquire from William Taylor and from William P. Murphy and the heirs of William Taylor?
A. The strip wouldn't be more than three hundred yards, I think, in low water, and not quite so much in high water; it would be from that to a half mile; no, not one half; I will say one half, too.
Q. Did you acquire all that water front of the William Taylor's and Wm. P. Murphy's lands?
A. Yes, sir.
Q. When did you acquire this land?
A. I think it must have been in '79 or '80 that I bought William P. Murphy's, and in '80 or '81 that I bought the heirs of William Taylor.
Q. And you continued in possession of that land how long?
A. Until '86.
Q. To whom did you sell it?
A. Donald Ross and O. D. Taylor, I think, was connected with it.
Q. They subsequently sold to Winans?
A. Yes, sir.
Q. Winans subsequently acquired the same land?
A. Yes, sir.

Q. Now, you acquired that land along the water for what purpose?
A. Well, for the fishing privileges was my main object.
Q. How many fish wheels did you erect?
275 A. None.
Q. How did you catch fish?
A. With dip nets.
Q. How many fish in a day would you catch, ordinarily, in a fishing season?
A. With one net?
Q. Yes, sir.
A. That would depend.
Q. Approximately?
A. Some days fifty pound, some days three hundred pound exceptional times, as much as twelve hundred pounds.
Q. In ordinary run of salmon, in three months, what would be an average number—amount of fish caught per day?
A. It would be hard to estimate it that way; they would average two hundred pounds to a man during the run.
Q. Did you fence right along the river when you acquired the land?
A. I enclosed it with my farm; that is on the north and at the head of the rapids; my fence commenced at the wheels which I run almost west, connecting it with my farm.
Q. But, really, your fence started at the head of the rapids and ran down the river to a point where O. D. Taylor's land commenced?
A. Yes, sir.
Q. Did you fence all that in at one time, or how much did you fence of that?
A. The farm that I purchased out there in connecting the farm that I purchased with that I purchased of the heirs of William P. Murphy, I done that all at one time.
Q. You were sued by the United States and the Yakima Nation of Indians?
A. Yes, sir.
Q. What year?
A. '82; I am not positive.
Q. A judgment was rendered against you and you were directed to permit the Indians to fish by the judgment?
A. I think it was two years before they got final action—the final action in the Supreme Court.
276 Q. The ultimate action gave the Indians the right to fish along there?
A. In common with the whites.
Q. How long after this decision was it you sold out?
A. Two years.
Q. Now, that was the only action brought against you, or against you on account of preventing the Indians from fishing there, was it not?
A. Only the one action.
Q. Then these Indians were protesting at the time you were in possession of this land against you preventing them from fishing there?
A. Yes; they were protesting.
Q. In fact the Indians always objected to any thing that fenced in that

fishery or prevented them from having rights there they were accustomed to?

A. The Indians that lived there?

Q. When you were fishing with nets you prevented them from fishing along this fishery under your claim of ownership?

A. Yes, sir.

Q. At that time you say O. D. Taylor had not acquired any rights; that is, he hadn't got his patent so far as you know?

A. He hadn't purchased the property.

Q. You heard these Indians testify about two villages, one that now exists and one that was torn down by Taylor; was that village on the land that you bought, the lower village, Se-we-paum?

A. I wasn't there when that testimony was taken; it was on the land I purchased from Mr. Murphy.

Q. That was on lot four, section thirty, township two, north range fourteen east.

A. Yes.

Q. The other land you acquired was the water front in lots one and two and five in section nineteen, township two, north of range thirteen east, and the next water front you acquired was a small corner in lot three, section thirty, township two north of range fourteen east, and also in lot two in the same section and township, and the water front in lot
277 five; in other words, you acquired all the water front from the head of the rapids down to the O. D. Taylor land.

A. Yes, sir.

Q. You did that for fishery purposes?

A. Yes, sir.

Q. At that time you knew the Indians were living there and fishing, didn't you?

A. To some extent.

Q. You had heard of the trouble that had occurred there?

A. No; they never had any trouble up to the time I enclosed it.

Q. Because of this trouble, was your enclosing this fishery and preventing the Indians from fishing there in common with you?

A. That was the first litigation.

Q. Now, the testimony is, that you have testified to, is that the trail coming through this tract came to the upper village called Wisham and ran down the river to Se-we-paum. You fenced across that trail?

A. Yes, sir.

Q. And closed it up?

A. Yes, sir.

Q. Up to the time you made the fence the trail was open?

A. Yes, sir.

Q. You say that was one of the plainest trails you have seen?

A. That was one of the plainest Indian trails.

Q. Why did you fence up that trail?

A. To protect my property.

Q. You knew that it was an old trail, didn't you; that it was an established way across the land there to that fishery?

A. As far as that is concerned, my whole place would have been established trails, because there are trails running out from my land in all directions.

Q. That was the principal trail?

A. Yes, sir.

278 Q. That came to the fishery?

A. The villages, not the fishery. They can not approach it on horseback.

Q. In proximity to the fishery?

A. Yes, sir.

Q. Did you give a warranty deed to this property that you sold, if you remember?

A. They knew the conditions the property was in; the suit was pending.

Q. Were the suits pending at that time?

A. They were not really pending; they knew there had been litigation, and that the Indians were trying to set up rights.

Q. So you did not deceive anybody that was buying it—that there were no adverse claims?

A. They fully understood there had been litigation on the part of the United States with O. D. Taylor. That was later; that was after the purchase.

Q. Did Winans know anything about this litigation that you know of?

A. I don't know anything about that. My acquaintance with them was later on.

Q. Did you find any trouble, if you had not been included in the litigation? Would the fishing with nets have been profitable there, Mr. Taylor?

A. It was unprofitable to me.

Q. Not very?

A. No.

Q. Did you make any money out of it at all?

A. No, sir; I sunk $4,000.

Q. Well, it was a profit to you there some time, wasn't it?

A. No profit there in fish.

Q. You had no canneries there?

A. No.

Q. You couldn't dispose of your catch?

A. I disposed of them—shipped them East.

Q. If you had been able to sell them at a fair price you could have made money—could you, or could you not?

279 A. Not the way the seasons have been the last four or five years.

Q. The way the seasons were when you were catching there?

A. Some seasons I could have made some money; some I couldn't. Some the run wouldn't average enough to pay.

Redirect examination by Mr. MAYS:

Q. Are there any canneries on that side of the river in this locality?

A. No, sir.

Q. Have there ever been any?

A. No, sir.

Q. Are there any canneries on that side of the river at any point?

A. Only at Astoria.

Q. Did you say how many people lived the year round at Wisham?

A. Three families, I believe—twelve or fifteen persons. In fact I have seen it when there were none. Different winters there were none lived there during the winter.

Q. Mr. Robertson, in putting his question, said the decree entitled the Indians to fish there. Did that refer to anything except the Wisham fishery?

A. That was the action that was brought out of that fishery. The Wisham fishery was mentioned; the other fisheries were not mentioned.

Q. Were there any other fisheries except the Wisham fishery mentioned?

A. I am not certain whether the other one was mentioned or not.

Q. As a matter of fact the description in the decree only covered the Indian village?

A. Yes, sir.

Q. Was this Indian village upon your land or upon public land? Do you know?

A. The upper Indian village is upon public land.

Q. About how much land did you own over there, Mr. Taylor?

A. I think it was about seven hundred and forty acres, as I remember now.

Q. Was that including these purchases you made along the river?

A. No; there were more than that. Six hundred and eighty—there was about eight hundred and forty acres.

280 Q. How did the going of the Indians in there effect your other land?

A. It threw all my lands open.

Q. What, if any, effect did it have upon your crop?

A. Nearly impossible to raise a crop during the summer. The Indians would let my fences down and let outside stock in. In the morning I would find pretty near one hundred head of horses in my grain field. It was a daily occurrence during the fishing season to find horses in my grain field.

Q. What, if any, claim did they make with reference to their right to pasture horses on your land?

A. Claimed the right equal with fishing—the right to pasture.

Q. With reference to your deeded lands? Your farming lands?

A. Right to pass over it wherever they pleased. Tear the fences down.

Q. How much land, all together, did you buy from Mr. Murphy?

A. Twenty-three acres, I believe, was the tract I bought from Mr. Murphy.

Q. Didn't you buy all the land he had there?

A. Yes; all the deeded lands he had.

Q. How much was it you got from the William Taylor heirs?

A. That I don't remember. Small fractions—neighborhood of seventy or eighty acres. All that there was in the heirship.

Q. When you speak of buying the shore land, do you mean that you bought the shore land from the State, or the Government land adjoining the shore of the river?

A. I bought the estate of William Taylor and Murphy; that is, the shore land adjoining the river.

Q. Did they buy from the State or the United States?

A. Direct from the United States.

Q. All the land that you owned was land they got from the United States?

A. Yes, sir.

Q. You never bought the bank of the river, or anything of that kind, from the State?

A. No, sir.

Q. This litigation with O. D. Taylor that was spoken of. That was with reference as to whether he had violated any injunction orders, was it not?

281 A. That was the case—contempt of court.

Q. *Before* whom was that heard?

A. Hanford, I believe, was the judge. I believe he was sick and Hoyt presided during the trial.

Q. What was the result?

A. He was not held in contempt of court.

Recross-examination by Mr. ROBERTSON:

Q. What was the purpose of that inquiry?

A. They alleged the trails were enclosed.

Q. At that time the trails were not enclosed; subsequently, however, you enclosed them?

A. I had sold out; O. D. Taylor was in possession of the property. This was in 1890.

Q. Had he enclosed the trails?

A. He had fenced on the other side, not enclosed them.

Redirect examination by Mr. MAYS:

Q. Do you know whether there is a wagon road now leading from the county road to this Indian village at Wisham?

A. There is a wagon road.

Q. Do you know whether the Indians have gone over the same with their wagons?

A. It is open; every one travels it; I travel it.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

MAY 21st, 1897—9.30 a. m.

F. A. SUFERT, a witness, called and sworn on behalf of defendants, testified as follows:

Direct examination by Mr. MAYS:

282 Q. State your name, age, residence, and occupation.

A. F. A. Seufert; age, 45; residence, The Dalles; occupation, canneryman.

Q. How long have you resided here?

A. Since 1880.

Q. Do you reside in the town?

A. I resided in the town seven years; at the cannery for the last ten years.

Q. How far is your residence from the corporate limits?

A. Three miles and a quarter.

Q. Where, with reference to what is called Winans' fishery?
A. Half a mile.
Q. Which side of the river?
A. Oregon side.
Q. How long have you been in the cannery business, and how long in the fishing business?
A. I have been in the fishing business since '83; I have run a cannery one year.
Q. This last year?
A. Yes, sir.
Q. Have you any fish wheels?
A. Yes, sir.
Q. Tell where and how long you have been running them?
A. The first I built in the winter of '86 or '87, and then we have been adding to them every year since.
Q. Where?
A. On the Oregon side and two on the Washington side.
Q. Where are the two located on the Washington side with reference to what is known as Winans' fishery?
A. Both above, east of Winans.
Q. How far above?
A. One a mile and a half, the other probably seven or eight miles.
Q. When were they each built?
283 A. I think one was built in '91 and one in '94.
Q. Before or after Winan' Brothers constructed any wheels?
A. I think it was after.
Q. Are there any fish wheels above Winans', on the other side of the river?
A. There are only those two stationary of ours and some scows.
Q. Is there any canneries above Mr. Winans' fishery, on the other side?
A. Yes; there is a cannery at Salido.
Q. When was that built; before Winans Brothers put in any of their fish wheels or after?
A. I think it was after Winans had some of their wheels in. I think the cannery was built in '91 at Salido.
Q. Have you put any wheels above Winans' since any of their wheels were put in?
A. Yes, sir.
Q. How many?
A. Well, we put in three on the Oregon side and two on the Washington side.
Q. Do you know about how many fish wheels there are on the river below Winans', and down to the mouth of the Columbia?
A. Well, I don't know the exact number; somewhere about twenty.
Q. Is there fishing done in other ways than by wheels down the river, below Winans', between that and the mouth of the river?
A. Yes; fishing done by seines, traps, and gill nets.
Q. Have you, in the course of your business, investigated the catch of fish and the different methods by which they have been caught?
A. Yes, sir.

Q. Do you know about what proportion of the salmon caught in the Columbia River, from Salido down to the mouth, is caught by fish wheels?

A. About five per cent the last two years, and before that it was something less than five per cent.

Q. Do you know whether these figures are substantially correct or actually correct?

284 A. Yes. They were gathered by the fish commissioner and other cannery men and shippers so as to make the annual report to the fish commissioner. It is the report to the governor of the State of Oregon of the fish commissioner, is where I got it from.

Q. What is the fact with reference to the wheels catching all the fish in the river?

A. I don't think there is anything in that, because we have wheels one above the other, and they all catch fish. Sometimes the upper wheel catches more than the lower.

Q. That is a fact, is it?

A. Yes, sir. The best wheel we have is one of the upper ones.

Q. Will they all be operated at the same time, too?

A. Yes, sir.

Q. And what is the fact with reference to whether fish are still caught above Salido?

A. Yes; they are still caught there.

Q. Are there any wheels above Salido still?

A. Only one I have heard of; that is near Lewiston, and one at the mouth of the John Day.

Q. How far above Salido is that?

A. Ten miles.

Q. What is the fact as to which course the salmon runs during the fishing season?

A. They all run upstream.

Q. Do the fish ever return?

A. Well, from best authorities, they all agree they don't return after spawning.

Q. Where do they go to spawn?

A. Headwaters Columbia and Snake rivers.

Q. What is the fact—that a great many of the salmon are found dead up there after spawning?

A. Yes; great numbers of them.

285 Q. By all the various methods which are employed, are anything like all the fish caught in the river?

A. I don't think they catch any proportion of them as a rule. There are a great many times the river is in such stages we don't catch anything, especially in clear water.

Q. Are the salmon running during that time?

A. Yes; the best run is in clear water; when the river is rising there are not very many running.

Q. What is the fact as to whether a fish wheel will prevent dip-net fishing above it?

A. Not at all.

Q. Do you know that fact by actual personal information?

A. Know it by fishing. We have men fishing right between the wheels with dip nets at times.

Q. Successful or not?

A. Yes, sir.

Q. Do you notice any difference in the amount of their catch when the fish wheels are not running and when they are?

A. No.

Q. I will ask you to state whether or not all the fish that go in the wheel are landed?

A. Greatest percentage of them; a few sometimes get out. As a rule whatever go in are landed.

Q. Do you know the location of Winans' wheels and the general typography of the country there?

A. Yes, sir.

Q. I will ask you to state whether or not in their construction and their location, and generally as to the construction of the wheels, whether it is with reference to the particular location with reference to its being the best fishing place, or whether it is located with reference to where it can remain permanently and at the same time also catch fish?

286 A. The main thing in the construction of a wheel, I have always followed and which has been followed here, is to get a point where the bluff is as perpendicular as possible, with a shelving bench in the bottom to build on in order to hold the wheel.

Q. Is it true that fish wheels can be maintained except where the formation and location of it is peculiarly fortunate and will withstand the current?

A. There are only a few points here where you can hold them in high water. Where the bank is sloping you have to build back; you can't hold them.

Q. It requires cribbing to make the wheels permanent?

A. Yes, sir.

Q. About how much space does the wheel itself ordinarily cover?

A. The length of the cribs are usually from thirty-two to forty-eight feet up and down stream.

Q. And the width?

A. The width outside of the crib of the wheel is from twelve to twenty feet wide.

Q. I wish you would state what the general typography of the shore is where Winans' fishery is.

A. Well, it varies. The greatest portion of it is sloping—in shelves, fifteen feet and less—gradually back from the low-water mark to high water. Some places it will run back nearly a quarter of a mile, I should judge—the upper fishery.

Q. What is the fact as to whether or not the places to take fish change from time to time as the water is rising and falling?

A. They vary. Sometimes you can't dip more than a day or two, or three days, as the water raises. You have to change according to the rise and fall of the river.

Q. Which way?

A. If the water rises you have to go back towards the bank. As it falls you go back towards the river.

287 Q. What is the fact with reference to Winans' fishery in particular as to whether or not the wheels which Mr. Winans have covers the fishing ground at places?

A. I think there is only one, I am quite sure there is only one fishing place covered by Winans' wheels all together; I think where the one wheel is, just below one of the Winan brothers' houses, there is a fishing place there; the Indians used to fish where the other wheels are located; I don't think the Indians ever fish there with dip nets.

Q. Take this one you speak of in particular, would the wheel being there in any way prevent them from fishing when the water was lower or higher than the wheel?

A. No; wouldn't prevent them from fishing above nor below.

Q. There is space to fish both above and below?

A. Yes, sir.

Q. Just when the water is in a particular stage?

A. Yes; there is a shelf of rock, that the wheel is built upon, where the Indians and whites used to fish; when the river rises ten to fifteen feet they fished on this bench, when it rose to cover this bench then it was twenty-five or thirty feet to the next bench, then they couldn't fish again until they could cover it from the next bench.

Q. What is the fact as to whether or not when the water is at a stage that the wheels can be operated at that time, the Indians could fish at many other places there in the same localities?

A. Yes; they could fish all along above or below the same time the wheel was running.

Q. Then is the fishing places along there at all confined to the particular points where the wheels are?

A. No.

Q. Can you give any idea what distance it is between the upper and lower wheel?

A. Of Winans'?

Q. Yes.

A. The first wheel is what we call the bay wheel, that is just at the big eddy, what they call the bay wheel from that to the small
288 wheel that stands back in a kind of an eddy, I should judge a half of a mile, I suppose up to the next wheel a quarter of a mile, then on to the next, that is all there is there, those three.

Q. Isn't there a wheel up at the point?

A. Yes, scow wheel; that is probably ¾ of a mile.

Q. Now then you may state whether or not there are fishing places from along between the various wheels there.

A. Yes; the most fish ever caught there are caught between those wheels.

Q. Up in the neighborhood or vicinity of where you have your upper wheel on the Washington side, you may state whether or not there is an old fishery there, Indian vailliages.

A. Yes, sir.

Q. Is there any obstructions, in the way of fences, or otherwise, to keep any and all Indians from going there to that fishery?

A. Yes; the land belongs to me; I have got it fenced.

Q. I refer to what is sometimes called the Skin fishery.

A. I have that fenced.

Q. Are there other fisheries along there that are open?

A. Yes; there is what they call the Ten-mile rapids, they are all open.

Q. Do many Indians fish there?

A. Yes.

Q. Could you give an idea about how many go there at various times during the year?

A. I suppose 25 or 50 sometimes, probably neighborhood of 100 have quite a large camp there.

Q. Do other Indians come and go there to fish?

A. Yes; there is no permanent Indian residents there, they all come and go.

Q. Have you excluded the Indians from fishing in your place, there?

A. When I fenced the land I allowed them to go in, and some lived there.

Q. Did other Indians come there and deal with these Indians any way?

A. Yes, sir.

289 Q. What for?

A. Those that lived there generally catched fish and they traded them and sold them. They traded them to the other Indians—got money, horses, whatever they could.

Q. There was Indians on this side of the river also, was there not, fishing?

A. Yes, sir.

Q. What is the fact as to whether or not the Indians that do that sort of work are local or reservation Indians?

A. Those along the river are mostly local, they stay here, they seldom go to the reservation. I had a few last year that belonged to the reservation.

Q. What is the fact with reference to the local Indians permitting the reservation Indians to fish?

A. They are bigger monopolists than the white men are. I know this, here on this side, when the reservation Indians come in to fish they all have to hire their nets up there and scaffolds to get out of the water to fish, unless they belong to the same family. They sell them all salmon and dry fish, and at the cannery we give them all the heads and tails, the local Indians get all the heads and tails and dry them and sell them to the reservation Indians.

Q. Do you purchase any salmon from the Indians?

A. Yes, sir.

Q. Could you give a statement of the amount of salmon which you purchased from the Indians during the last year or two?

A. Yes; I have got the amount for the year 1896. We purchased 55,209 pounds from the Indians.

Q. During the year of 1895?

A. 183,440 pounds.

Q. What is the fact as to whether you purchased more or less than that previous years?

A. Some years more, some years less, depending entirely on the run of fish.

Q. What is the fact as to whether or not the Indians are regular sellers of fish each year?

290 A. I have always known them to sell whenever the season was open.

Q. Do you know whether or not there were other cannery men buying during last year and the year before?

A. Yes; David Howe and the shippers in town here bought of the Indians.

Q. Did Taft of the cannery at Salido?

A. Yes, sir.

Q. Was there any other canneries here in the city?

A. Yes; Hemck's cannery bought some from the Indians. There was a cannery that was operated on our place, Everdeen & Ferrell, run under the name of The Dalles Packing Company; they bought from the Indians.

Q. How long have you been operating on the Washington side of the river?

A. I think the first year we built there was in 1891 or 1892. We gave that to some man to operate for us, and the upper wheel we operated in 1894; we have been operating that since.

Q. What is the fact as to whether you fished in any other way than by the wheel on the Washington side?

A. Sein'.

Q. Did any of the Indians fish with nets or sein's over there?

A. We have a few here fishing with a small sein'; they fished for us last year with small sein's. That is the only way I have known them to fish over there with a sein'.

Cross-examination by Mr. ROBERTSON:

Q. Mr. Seufert, did you use the word "ever" advisedly in your testimoney when you say you don't think that the Indians ever fished at the points where Winans' upper fish wheels are?

A. Now where the fish wheels are?

Q. Where the two lower fish wheels are.

A. I have known them to fish there.

Q. You have said "ever;" you know that means from the beginning of the world.

A. I don't think they ever fished there, because the lay of the country and lay of the water is such that it is a total impossibility to catch fish there with dip nets.

291 Q. At least twenty men have testified here they did fish there with dip nets?

A. I doubt it.

Q. That is, you put your opinion against the sworn testimony of twenty persons?

A. Yes, sir; I fished there a good many years; once in awhile a man that never fished comes along and tries to fish, never catches any.

Q. Now, those points where the Indian villages are is above, isn't it?

A. Above.

Q. You say they never fished up there?

A. I don't say that.

Q. You say they did fish there?

A. Yes, sir.

Q. You say they never fished at the points where Winans' fish wheel now is?

A. Not where the bay fish wheel is.

Q. Now, I will ask you if it isn't a fact that they fished all along from the eddy to the upper part of the rapids?

A. They never did; it was a total impossibility for them to do it; I don't think the current of the river was so they could, or it was before 1880.

Q. In 1880 some of those lands were enclosed?

A. Yes, sir.

Q. You also say that the best authorities say that salmon never go down stream, and you also say you are familiar with the fish commissioner's report?

A. Yes, sir. I take the State of Oregon fish commissioner's reports; we have all to report to him.

Q. Don't you know it is a fact that the salmon at the Snake River and other places along the Columbia, have been taken after spawning, and that they have been marked and turned loose again?

A. Yes, sir.

292 Q. Don't you know the young salmon hatched in the Columbia, have been marked and turned loose?

A. Yes, sir.

Q. Don't you know fish that have been spawned, marked, and turned loose return, some in two and some in three years?

A. I have never heard of one that was marked that was ever heard of afterwards.

Q. Will you swear they never come back?

A. Not to my knowledge.

Q. I will ask you if you have not frequently caught fish in fish nets with marks of having been caught in nets before; old marks healed up?

A. Not exactly healed, but in process of healing; a good many.

Q. Haven't you caught some that evidenced to you that they were caught two or three years before, and escaped from the gear?

A. No, sir.

Q. You mean then to state that all the fish that go up the Columbia die?

A. Yes, sir; I take my information from the report of the United States Fish Commissioner.

Q. Where is that report?

A. I have one.

Q. I would like to have you bring that report.

A. I will bring you the report of Mr. Everman; he reported that he investigated this question, and they certainly all died.

Q. But you, as a cannery man, Mr. Seufert, never heard of any fish commissioner of Oregon, or the United States, making a report that fish that he had marked had ever returned?

A. No, sir.

Q. The young salmon return the third year after they are spawned?

A. That is all a theory; they have got no proof for it.

Q. I will ask you if they don't say so.

A. They say this, and some they return the fourth year.

Q. You say this is a theory?

A. They don't know anything about it.

293 Q. However, they are not mistaken about the fish dying?

A. Those men that the Government has hired to investigate it, they have put in all their time, and they say they do.

Q. There are some falls up here the fish do not go up successfully?

A. They can go over any falls there is along here.

Q. Where are they stopped, according to your belief?

A. Not until they yet up to the headwaters of the Snake and Columbia.

Q. What is there *there* that stops them?

A. Salmon Falls, Snake River.

Q. What on the Columbia?

A. Different falls up there.

Q. You are satisfied that stops the fish?

A. Yes, sir.

Q. There is plenty of water, both in the Snake and Columbia, at the point of these falls?

A. Yes, sir.

Q. What is there to prevent these fish returning or swimming downstream?

A. Nothing to hinder. They never swim downstream until they have spawned; then it is doubtful.

Q. That is the theory that you cannery men adopt, that they die and you better kill them?

A. No, sir; the theory is handed down to us by these men employed by the United States Government; such men as Professor Jordan, of the Stanford University of California, has investigated it, and he reports that they all die.

Q. I don't want you to state what these reports are; I want you to produce them. You say that the fish wheels of Winans Brothers does not prevent fishing along that place?

A. Not outside of; merely the small place they occupy.

Q. These paddles are about how many feet apart in the fish wheels?

A. The wheel is usually made twenty-four to thirty-six feet in diameter.

294 Q. How about the length?

A. Three pedals; we haven't any wider here than eight feet, some as narrow as five feet.

Q. The wheel is constructed with a wire basket or trap, is it not?

A. Yes, sir.

Q. This wire basket goes down into the water with a sweep, and the fish going up are caught in the basket, and there is a box in the center of the wheel sliding towards the end of the wheel. The fish slide down through this slanting box into the box when it is in process of revolution?

A. Yes, sir.

Q. Doesn't stop the wheel?

A. No, sir.

Q. You say pretty near all the fish going through that wheel are caught, and think it doesn't interfere with the fishing?

A. I told you the wheel at its present stage of water. We have had

our wheel forty-five to ninety feet when the water rises below the water-mark, and that explains why the wheel doesn't catch all the fish.

Q. Mr. Seufert, in this cross-examination of you, I don't desire that you make explanations. I want direct answers to my questions when they permit—direct answers if possible.

(Counsel for defendant desires to say that Mr. Robertson asks a question and then before the witness has completed his answer, will proceed to put another question and prevent the answer from being completed.)

Q. Now, Mr. Seufert, you bought a hundred and eighty-six pounds of fish from the Indians in '95?

A. I bought a hundred and eighty-three thousand four hundred and forty pounds in 1895.

Q. From the Indians?

A. Yes, sir.

Q. Then the Indians, with dip nets and other primitive appliances, in 1895, brought to your cannery in 1895 a hundred and eighty-three thousand four hundred and forty pounds of fish?

A. Yes, sir.

295 Q. What is the value of those fish?

A. They run from a cent a pound to three cents a pound, according to the varieties.

Q. About forty thousand dollars worth of fish, wouldn't it be?

A. I couldn't very well get at it without figuring it out. Probably, figure a cent and a half a pound, would be a very low estimate of it.

Q. Five thousand dollars worth of fish?

A. I should figure it would amount to between three thousand five hundred and five thousand dollars.

Q. About how many Indians were there that brought those fish to you?

A. I don't suppose there were over twenty-five or thirty.

Q. You say you furnished some of them seins'?

A. One small sein'.

Q. The others you furnished nets?

A. We sold them twine to make nets.

Q. You set them to fishing on your fishing grounds?

A. Some of them, some Mr. Winans'.

Q. Well, they were all caught on your ground and Mr. Winans' ground, practically.

A. Yes, sir.

Q. Not one of those Indians you would have permitted to fish there unless they brought their fish to your cannery?

A. Yes, sir; for their own use.

Q. You state, however, you disposed of the heads and tails to some of the Indians, and they sold them to the reservation Indians?

A. We give them all the heads and tails of all the fish we dressed.

Q. They sold the reservation Indians the heads and tails and you got the body?

A. We bought them all.

Q. The heads and tails are unmark'able by you, are they not?

A. No; not exactly; we can use them all in fert'lizing the orchard.

296 Q. In that little orchard of yours up there?
A. Yes, sir.
Q. You get all the fert'lizer for that you want, don't you?
A. Yes, sir.
Q. White men won't eat these heads and tails?
A. Some white men would; they think they are the very best part of the fish; after they come in such large quantities couldn't get a white man to eat them?
Q. There is no sale for dried heads?
A. No, sir.
Q. Nor dried tails?
A. No, sir.
Q. How many fish per day did these twenty Indians or twenty-five Indians, fishing about ninety days—they fished about ninety days, did they, or more?
A. More.
Q. How much more?
A. They fished in the months of April, June, July, and August, part of August, September, and October.
Q. So they fished about six months? Now, how many fish a day did these men catch, about?
A. I couldn't tell you that.
Q. Can you tell me approximately?
A. No, I couldn't; some days only two or three, some days a ton.
Q. So if you and Mr. Winans did not permit these Indians to fish for you they would not have caught that a hundred and eighty-three thousand pound of fish in 1895?
A. There was no permit about it, they went there and fished, those fish that we bought, a good many of those Indians were fishing on Winans' ground. I don't know whether he permitted them or they went there and took it.
Q. Mr. Winans' fish wheels are located at the best points on the Columbia, are they not?
297 A. I think not; they have not proved so.
Q. The river where Winans' big fish wheel is, where the old Indian village was, in ordinary water is confined in a channel not to exceed two hundred feet wide?
A. Yes, sir; about that.
Q. The current is so rapid there it is impossible to keep a fish wheel in there?
A. Yes, sir.
Q. How many miles an hour does the river run there?
A. Twenty to thirty miles an hour.
Q. The fish hug near the shore?
A. To some extent.
Q. They run up the stream?
A. Yes, sir.
Q. Winans' fish wheel would be above the fish there going upstream?
A. Yes, sir.
Q. It is in the nature of a slight obstruction in the river?
A. Very slight.

Q. And to some extent it breaks the current?

A. Not to amount to anything along there.

Q. Well, you said, as I understand, that the upper wheel was about twelve feet wide?

A. Yes; about that.

Q. So there is a wall twelve feet wide and thirty feet long in that swift current?

A. Yes, sir.

Q. There is also another wall next to the bank, and the fish wheel turns in the center?

A. I don't think there is another wall close to the bank, only the timbers.

Q. At that point the current runs thirty miles an hour. Is it not a fact that this obstruction in the water makes a slack water right where that wheel is, and that makes a place where the salmon would run?

298 A. No; if you have slack water where the wheels are you can't catch any fish.

Q. I don't mean slack water; but the building of the wheel across where the fish go up will check the swiftness of the current, and the fish hug the shore, do they not?

A. More or less.

Q. At this particular point, then, where this current is swiftest of all, this wheel occupies about twenty feet of the river?

A. Yes, sir.

Q. Next to the shore?

A. Yes, sir.

Q. How many fish a day in a good time does a fish wheel catch?

A. I doubt whether Mr. Winans' wheel there caught over three or four tons a day, and I know there were days that he wouldn't catch that.

Q. There is evidence here this wheel has caught four four-horse wagons full in a day.

A. All the wheels?

Q. I will ask you if it is not a fact that this wheel has caught as much as ten tons per day?

A. No; I think not. The present wheel I don't think ever caught ten tons.

Q. I will ask you if in '84 they didn't catch so many they had to be thrown out, they couldn't use them at all?

A. No; in '84 they were not built then.

Q. When were they built?

A. 1890.

Q. You own land on the Washington side?

A. Yes, sir.

Q. Where?

A. In sections eighteen and thirteen, township two, north of range fifteen east. Looking at this plat, there is the principal fish wheel; my land is opposite Salido.

299 Q. You have no land along that fish wheel, then?

A. No, sir.

Q. If one fish wheel does not catch all the fish, why is it, then, that one fish wheel does not follow the other all along the river?

A. Well, the bigger part of the country is so you can't construct them one behind another; you are in good luck if you can get a place in a mile or half a mile to construct one.

Q. If you could construct them, you might have a hundred and fifty wheels from the upper to the lower point?

A. Yes, sir.

Q. And the lower catch as much fish as the other?

A. Of course, they have never been built that way.

Q. You believe one would catch as many as the other?

A. I don't think much difference.

Q. The typography of the country is alone reponsible for the fact that there are only four fish wheels over there. Isn't it a fact that they could have twenty-five scows along there?

A. No; they couldn't hold it in the current.

Q. Why couldn't they hold it in the current; they hold it up in the rapids.

A. But don't catch any fish.

Q. I will ask you if you have not heard of it being sunk by being loaded with so many fish?

A. I sold that to Winans to pay me when he caught fish to pay for it. I think he has had it four years and I have got a hundred and fifty dollars.

Q. Your wheels have caught fish this morning?

A. Yes, sir.

Q. How many?

A. I couldn't swear one.

Q. How many yesterday?

A. None yesterday; the wind was blowing and we had them all up.

300 Q. You keep books?

A. Yes, sir.

Q. Would you mind to produce your books here to catch of the fish wheels every day?

A. I don't think that cuts any figure with Winans?

Q. I ask you would you mind showing your books?

A. I would not like to.

Q. Then you object—you are not willing to state to the court how many fish your fish wheels have caught every day?

A. I don't think that cuts any figure in Mr. Winans' case; if it was in my case I would produce them.

Q. In this case you refuse to answer the question?

A. It is private business of the firm and I wouldn't care to produce it.

Q. You refuse to bring your books here to show the amount of fish caught every day in your wheels?

A. Yes, sir.

Redirect examination by Mr. Mays:

Q. Will you state generally about what you caught—the wheels on the Washington side?

A. Well, I don't think I could—the fish wheels on the Washington

side—I can state either one of these wheels on the Washington side has never caught five tons of fish in one day.

Q. How is it as to whether they catch large amounts some days, others much less?

A. Some days catch well, some days practically nothing.

Q. What is about the usual annual rise up there of the river?

A. Well, it varies at the lower end of the rapids, from high water or from low water to extreme high water from about eighty feet to the upper end of the rapids, from low water to extreme high one hundred and nine.

Q. Do you mean to be understood as claiming that the spawn of the salmon don't go back down the river?

301 A. The spawn of the salmon after they are hatched all go down the river.

Q. It was only the old salmon you were testifying about?

A. The old salmon die.

Q. Do you know whether the head of the salmon are considered desirable by the Indians or not?

A. Yes, sir; they are. They are anxious to get them always, ever since we have been in business.

Q. Do you know what is their idea about the head of the salmon, as to its being desirable?

A. They claim it is the best part of the fish.

Q. Does the fish wheel prevent the water running through it?

A. No, sir.

Q. It revolves in the water?

A. The current revolves the wheel.

Q. Have you any objection to allowing counsel to examine your books so far as the amount purchased by the Indians are concerned?

A. No, sir.

Q. Have you any objection to allowing counsel to examine your books generally at any time?

A. I don't think I would have, any information he might want of a confidential nature.

Q. Is the refusal you made awhile ago on account of any desire to cover up anything in connection with this case in any way?

A. No, sir.

Q. It is simply because you think it has nothing to do with the case?

A. That is all.

Recross-examination by Mr. ROBERTSON:

Q. Mr. Seufert, do you believe that little salmon run down the stream, and old salmon runs up the stream?

A. Yes, sir.

302 Q. And the little salmon never runs upstream, and the old salmon never runs downstream?

A. I believe after he gets to the spawning age.

Q. I mean before?

A. Not until then.

Q. You speak also that these fish come up about the fourth year?

A. No. I don't hardly believe that.

Q. How old do you think salmon are when they come up the first time?

A. I believe there is no specified age in the Chinook salmon. They spawn close to the ocean. I don't believe they die; they don't get far enough away from salt water.

Q. You know salmon spawn is caught down in the mouth of the Columbia in nets frequently?

A. I have heard that said; I don't know anything about it.

Q. I will ask you if it is not the general idea, you say it is the general idea set forth in the commissioner's report, that they, the other salmon, go up the fourth year?

A. Yes, sir.

Q. You believe these young salmon go down to the ocean, come up the fourth year, and die?

A. I don't mean to say the life of a salmon is four years. What I mean is, after he goes to the head water of this river that he then dies, and doesn't return back to the ocean.

Q. How big is a four-year-old salmon?

A. I don't know as I ever saw a four-year-old.

Q. What is your idea of the growth of the salmon?

A. Four years, they claim a four-year-old Chinook ought to weigh twenty-five or thirty pounds.

Q. Are you expert on the Indians' taste in regard to the part of the fish they like?

A. No, sir; I have never seen an Indian very particular.

Q. The white man prefers the salmon belly?

A. Some do.

303 Q. You get the best price for salmon bellies?

A. We don't get——

Q. Do you know they are the highest-priced fish?

A. Yes.

Q. I will ask you this—I don't want to inquire into your private business—I will ask you if you will permit me to take a bookkeeper to get this information: (1) The number of fish you caught in each fish wheel during the last five years, then the number of fish that you have bought from persons catching fish with small gear, nets, and other primitive appliances; (2) the amount you have bought from the Indians, and (3) the total amount of fish caught along the fishery there on this side, or, if there is any one of those particulars you object to, I ask you if you will permit me to have an expert examine your books to determine how much fish you took each day from each fish wheel?

(Counsel for defendants instructs the witness to object to any examination of his books, unless it be that with reference to the land purchased by him from the Indians he has already testified about, because it is immaterial and can have no possible bearing on the case.)

Mr. SEUFERT. I want to state this, that those books belong to a company; I am merely one of them, and wouldn't be permitted to give any permission to examine those books without asking them.

Q. The plain and unvarnished fact is you don't care to disclose the number of fish you catch there?

A. I have no objections to that in particular; I don't care about throwing my books open to a case that don't concern me.

Q. Will you get me a monthly statement of the number of fish in each wheel?

A. I am not sure I could give you each wheel; I could give you the amounts.

Q. I would like to find out the extent of this fishery—the number of fish caught there.

A. I could give you a statement of each year—how many fish we have taken; I think that is the way we have it.

304 Q. How many fish did you catch on the first of July last year with your wheel?

A. I couldn't tell.

Q. Can you tell for the month of July how many you caught with wheels?

A. Yes, sir.

Q. Now, can you tell?

A. No; not without referring to the books.

Q. When you were buying those fish from the Indians, how many fish did your wheels catch during the season of '95? I mean '95.

A. Well, I couldn't state; thought maybe I had it here, but I have not; I see here five thousand one hundred and sixty-eight tons; I don't know whether that is correct or not.

Q. In '96 you bought fifty-five thousand pounds from the Indians?

A. Yes, sir.

Q. Last year Mr. Winans wouldn't let a great many of them fish at all?

A. Not that I know of; they brought some from Winans and some from Salido.

Redirect examination by Mr. MAYS:

Q. Have you been notified in any way to bring in the books?

A. No.

Q. Will you bring them in if properly subpœnaed to produce them?

A. I suppose if there was an order of court I would have to.

Q. Do you know the part of the salmon called salmon jowels?

A. Yes, sir.

Q. Where is that gotten from—what part of the body?

A. I think it is gotten near the head.

Q. I will ask you if that is not considered especially desirable?

A. A great many of the packers claim that is the finest part of the fish.

(Defendants' counsel here states to the court and opposite counsel that the books of the witness are the books of a corporation, and that if the plaintiff will submit any special or general information which he may desire, which can even remotely bear upon the case, that he will endeavor to secure that information for the plaintiff.

305 Defendants' counsel further offers to permit plaintiff's counsel to inspect witness' books or to have witness furnish to him any information in relation to the total amount of fish caught each year, and as far as he can, and he makes this offer because counsel seems to be endeavoring to make it appear that there are some facts in connection with the books which we are unwilling to disclose, which is untrue.)

Mr. ROBERTSON. The witness being defendants' own witness, and his refusing to answer the question under the direction of counsel, and having refused to produce the books, I have no further questions to ask unless the books are produced for the inspection of the court, at which time I will conduct the cross-examination.

Mr. MAYS. And counsel having declined our propostion, we refuse to produce the books unless called for in the proper legal method.

WILLIAM D. GILMORE, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, residence, and occupation.

A. William D. Gilmore; reside in Klickitat; age, 46; ranch a little, raise a few stock—kind of a mixed farm for stock raising.

Q. How far do you live from Winans' fishery?

A. A mile and a half—probably two miles.

Q. How long have you resided in that community?

A. Since the fall of '71—since October, '71.

Q. Are you acquainted with the typography of the country and the means of fishing used by the Indians a good many years ago?

A. I have been over it quite often.

Q. Do you know where the Indian village is now, by Wisham?

A. I don't know it by that name.

Q. Do you know where an Indian village is?

A. I know a place up there we called Colwash. A chief by that name was chief when we first came here.

306 Q. Was that an Indian village then?

A. Yes, sir.

Q. Is that there yet?

A. Yes, sir.

Q. Were there Indian trails when you went over in the country which came to that place or came near that place and were then all verged in one trail?

A. They came down in a place they called Colwash bottom, then came down to an Indian village.

Q. How many trails were there that came in there?

A. Five or six.

Q. To what place did they come?

A. They run northeast right into the Indian camp; one runs about east, and then one runs in a northwest direction.

Q. Do you know what points they are going to?

A. One to the berry patch and one to the upper fishery; one to Simcoe and one over there in the mountains back of the blockhouse. I don't know what they call it—kind of a summer resort.

Q. Were there any trails going down to the river toward White Salmon from there?

A. Yes; one down there.

Q. Did they all come together?

A. Yes; they come together quarter of a mile before they struck the camp.

Q. Do you know where the Pass is there after they come together?

A. Do you mean a rock there by the Indian camp? It is just a cut in the rock.

Q. Do you know where that is?

A. Yes, sir.

Q. They all come together before they come to that?

A. Yes, sir.

Q. Do you know whether there is any other bluff or cut in the rocks in any other locality like that in another locality from that?

A. Yes; I do.

307 Q. You heard Mr. Wood testify yesterday, did you?

A. Yes, sir.

Q. Where is the cut or pass located that he was testifying about?

A. About two miles from there.

Q. About what direction?

A. Northeast direction.

Q. What is the general outline of the shore along where Winans' fish-wheels are, as to being precipituous or receding from the water?

A. I don't know where but two of the wheels is, I think of but two, I never taken any particular notice of them.

Q. Take the shore generally?

A. One place it is receding, another it is more perpendicular.

Q. How is it generally?

A. It varies in spots, it runs up perpendicular, other places go along for one hundred yards, it runs back.

Q. When the water is high does it or not extend back over the shore land?

A. Yes, sir; in some places, other places it does not.

Q. Have you seen the Indians fishing at various points along there?

A. Yes, I seen them fishing some.

Q. How is it with reference to their fishing, as to their being compelled to change, from time to time, their location?

A. It is just owing to the stage of the water, as the water comes up they got to move their staging, as it goes down they got to move their staging, they fish on the rock, and as the water is rising like it was a day or two ago, they have to move back.

Q. Do you know whether during the time you have been living there and up to a year or so ago, whether the number of Indians have increased, diminished, or remained the same?

A. There are not so many Indians in the last few years as when we first came there.

Q. Take it three years ago, for instance, and take it when you first went there, what would you say the relative proportion was as to being one-half, one-third, two-thirds, or what?

308 A. I couldn't say as to that; I never paid any particular attention to them, passing their camp, I lived above there on the river, I drove sometimes in passing one hundred and fifty or two hundred yards of the camp, sometimes by the camp, you couldn't tell anything about that, some days they would come to the camp just above, you see, to-day, or maybe tomorrow the other camp, I never paid any particular attention to the number that was there.

Q. Was there anything like as many three or four years ago as when you first came there, that came to the fishery?

A. No, there was not.

Q. Can you give any idea how they would compare?

A. I don't think there was one-third as many as there were when we first came there.

Q. You are the son of S. Gilmore, who is justice of the peace over there some years ago, and a brother of Thomas Gilmore, deceased?

A. Yes, sir.

Q. Both of them are dead?

A. Yes, sir.

Cross-examination by Mr. ROBERTSON:

Q. Did you ever sell any land to the Winans?

A. No, sir.

Q. Were you ever interested in this fishery in any way?

A. No, sir.

Q. You never fished?

A. I fished, yes, sir; the same as anybody would; you could go along and give an Indian a quarter for a net, and if you could catch any fish you could do so.

Q. Did you ever catch any?

A. Yes, sir; I caught two at once in a net, that was a good many years ago.

Q. How big are the nets the Indians use?

A. I think, if I remember, about two and a half feet across, probably three feet long; dip with that; they put on a long pole.

309 Q. You wouldn't be positive that the number of Indians have decreased one-third, would you?

A. Yes; I am positive of that, when I first came there——

Q. You know the Indians are decreasing in numbers?

A. Do I know it?

Q. Yes.

A. Yes; I do.

Q. You would not say that the proportion of living Indians coming to the fisheries prior to the time they were shut up by Winans were any less, would you?

A. Yes; I know a whole lot that don't show up any more, I see them on the reservation when I go over there, some can't come, that may be.

Q. You say you only pass occasionally there?

A. I passed by there, seen them Indians, they generally pass my place when they came to camp.

Q. Were these trails plain trails or not?

A. Yes, sir; plain trails.

Q. How plain?

A. So plain they have been fenced up for fifteen or sixteen years, and whenever you find one of those trails you can tell it now.

Q. The trails all run into the Indian village?

A. Yes, sir.

Q. There were two Indian villages you say, the upper and lower?

A. Yes, sir.

Q. Skamia, that was the upper?

A. Yes, sir.

Q. How many houses are there in the Indian village now standing?

A. I couldn't tell you now, in winter time I could tell you, I couldn't now.

Q. About twenty-five or six, aren't there?

A. I couldn't tell now. I think in the winter time Stick Charley, Bill Charley, and Joe, that is all that stop there in the winter time.

310 Q. But is it not a fact that they have no way of obtaining fish there now, to make them stop at that place?

A. I couldn't speak as to that; I am not interested in them fisheries down there; I don't know.

Q. How many Indians, when you first knew them, came to this fishery?

A. The first year there must have been as high as five hundred there at the fishery and around there.

Q. You never saw any white men fishing, did you?

A. Yes, sir.

Q. Where were they fishing?

A. Up in the rocks.

Q. What were they fishing with?

A. Nets.

Q. When was that?

A. That has been different years.

Q. They didn't fish there in the old times, did they?

A. Not early days.

Q. To any great extent?

A. No.

Q. You never put up any salmon yourself, did you? Do you ever eat salmon yourself?

A. I do.

Q. Do you make that one of your principal articles of food?

A. No, sir.

Q. Wasn't raised on the Columbia, were you?

A. No; I like salmon once or twice a year.

Q. You couldn't eat it every day?

A. I might if I was forced to, I don't hanker after it.

Q. Where were you raised?

A. Willamette Valley.

311 Redirect examination by Mr. MAYS:

Q. Who did you see fishing there?

A. John T. Lucas, a friend of mine that went with me when I hired the net, he went with me.

Q. Do you know whether any other people than the white people have any of those trails fenced up?

A. Yes, sir; I think they have.

Q. Who?

A. Cut-mouth-Dave and old Bill Spedies has some of the old Indian trails fenced up; Indian Frank Silatsi, I think, has it fenced up.

Recross-examination by Mr. ROBERTSON:

Q. That is not the upper trail that come down the hill to the Indian village, that is now open?

A. There is one trail they didn't use, when I first came here, that is open, they used it to go out towards White Salmon, is the one that is open.

Q. Those trails come through Winans' place before it meets either Indian settlement, don't it?

A. If you understand the head of the fishery is above the falls, there is an Indian camp at the head of the rapids, Mr. Winans lives down below there. They start from the Indian camp, those trails go right through the country.

Q. There is no Indians that have any fences between the Indian villages on the trails?

A. No, sir.

Q. No Indian has any fence between the mountains on the trails where they first come to the Indian village?

A. No, sir.

Q. Who is it fenced up by, Mr. Winan?

A. Yes, sir.

Q. Whose place is it?

312 A. I don't know who the place belongs to, it is a fence that runs down there that used to belong to O. D. Taylor, or Frank Taylor, and he sold to O. D. Taylor, and this mortgage company has got it.

Q. Winans own all that fishery now?

A. I don't know what they own, anything about it.

Q. They would not communicate any information?

A. No.

Redirect examination by Mr. MAYS:

Q. Take the trail going north from this Indian village to the border of the land where the Indians have that trail fenced up, and don't they have to go off on the wagon road?

A. They have to go on wagon road.

Q. Indian settlers themselves have the trail fenced up?

A. Yes, sir.

Q. That wagon road answers the same purpose as the trail?

A. Yes, sir.

Q. When you go down to the Indian village there is no trail at all but a wagon road, isn't there?

A. There is a wagon road from one Indian camp to another.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

N. WHEALDON, a witness called and sworn on behalf of defendants, testified as follows:

Direct examination by Mr MAYS:

Q. State your name, age, residence, and occupation.

A. N. Whealdon; age, 44; residence, The Dalles, Oregon; occupation, insurance agent, at present.

Q. Are you the Whealdon who had to do with what is now called the Winans fishery, several years ago?

A. I am.

313 Q. About how long ago was that?

A. I had it leased ten years ago this summer.
Q. For how long did you have it?
A. One year. I had charge of the fishery the year following.
Q. For whom?
A. I was then working for Taylor, who owned the fishery.
Q. O. D. Taylor?
A. Yes, sir.
Q. You may state if you know, about the removal, if it was a removal of the Indian village there at Winans' fishery, a short distance below where an Indian village now stands.
A. The year that I had the fishery leased in '87, there were remnants of a village, perhaps one-half mile below this present village they call Wisham, there was one Indian family resided there permanently, and perhaps two others came there for a short time temporarily, simply pitched camp for a week or ten days; there was also quite a lot of what you would call rubbish, two or three small houses were piled up, a storehouse not to be occupied to live in, at this point the Indian that resided there, his name is Moushet, I see he is the same one that was in evidence at Yakima. When I first came to the fishery he was camping in a tent at the big eddy during the fishing season; he camped at this old village which is located at the head of the rapids, and he continued to reside there after the fishing season had closed, late in the fall. O. D. Taylor then owned these lands upon which the fisheries were stationed. He gave him notice to vacate the premises and he failed to vacate the premises, and an action was brought for trespass and ejectment before Squire Gilmore at Rock Island precinct, Klickitat County, Washington, the same precinct in which this village was located. The action was sustained and a small fine imposed and the cost of the action against this Indian. Thomas Gilmore was constable and did the serving of the papers, and after this ejectment this Indian Monshet, and the lumber and poles at the small store building or two that were there was hauled away by Charles
314 Mitchell, under the direction of Thomas Gilmore, constable of that precinct. The ground was cleared and cultivated the year following.
Q. Did you personally have anything to do with the actual removal of the building or tearing of it down?
A. Nothing whatever. All that was done in connection with it was done under the direction of this justice court; I knew of it being done, but was in no way connected with it.
Q. Do you know whether any of the houses were lassoed or dragged down, anything of that kind, or do you know what was actually done?
A. Don't know anything about that. The houses that were there were wickeups and rubbish which was hauled about half a mile below this point and burned on the premises—some used for wood; some Indians came and got pieces for wood afterwards and it finally and gradually disappeared from the place, it was piled up.
Q. About what is the usual annual rise of the water there, if you know?
A. It varies.
Q. But take it generally along there?
A. I presume the average year the rise would be about seventy-five feet.

Q. What is the character of the shores there, as to being receding or otherwise?

A. There are three reefs in the main channel in a mile and a third from the big eddy up above the village of Wisham, one just above the big eddy. The lower rocks they are bare during the early fishing season; another one above the first high promontory that infringes upon the river which is very narrow; that is to say, about five or six hundred feet along the shore, and then abreast the Indian village they call Wisham; there is about one-third of a mile from the head of the rapids and is receding along the center of the river. There are two places that are perpendicular, practically perpendicular from the water up to the surface, the lower one of which has been overflown in extreme high water; the upper one, I think, never has been overflown, though I wasn't there in the extreme high water of '94.

315 Q. Are there any particular defined fishing locations along these points which are occupied during the fishing season, or does the points vary from day to day according to the height of the water?

A. They fish according to the stage of the water; there are fishing stages there at all times; there are fish there to catch. The best fish are caught just above the big eddy or above this village of Wisham in the low stage of the water.

Q. What constitutes the fishing station; is the current of water near to the shore?

A. The current of water near to the shore.

Q. Are there any such a thing as particular, specific points of fishing along there, or is it capable of fishing most anywhere, according as the condition of the water allows?

A. There is no point constantly in a fishing condition that was used as a net-fishing point; a net-fishing point upon the stage of water to-day might be good to-morrow, or it might be submerged, or the water might recede and it would have to be removed to a place to fish.

Q. How would the Indians fish then?

A. Change as the current change to a more favorable locality.

Q. Then take it at a good place along the shore where it was receding, what might be the distance between where the station would be put up for the first fishing and where it was put up for fishing at the highest water mark; about what distance?

A. Where the use of staging at the one point the water would have to raise only a few points to change the condition and destroy that station, and the number of feet would be covered by another of the points. The only point upon the fishery that can be fixed any length of time is from the big eddy about one-third to the head of the rapids. I fished one man upon that point thirty days, or during the working days of thirty days of May, in 1887. He commenced with an extra long pole, and the water raised there a great deal; he wound up in the water. There is not a point on that side of the river where either fishing staging or fishing tackle rests on them after one or two days.

316 Q. You know where these fish wheels are located, Mr. Whealdon?

A. I do; three of them.

Q. You understand the three below are wheels, and the upper one is a scow?

A. I don't know but two of the lower ones where they are now.

Q. The two with reference to Mr. Winans' house?

A. There is one about one-half mile below Mr. Winans house; the first wheel above the big eddy; there is a second stationary wheel a short distance above his house opposite this vacated village, and then the scow wheel at the head of the rapids.

Q. Could it be possible to locate fish wheels anywhere there which would prevent the Indians from fishing generally along the shore?

A. The location of these wheels is not such as would probably interfere with their fishing points at all; at the immediate point of the location perhaps they could not fish; the lower wheel could be fished with nets, probably a day or two, I think; that station is below where the wheel is located at this vacated village; the nearest point to that is just below it about a hundred and forty feet. One Indian did fish there; the staging would remain during the rise of the water in a certain condition; he would build the stage and fish for a few days; I should say forty feet below where the wheel is located. The upper place I never knew it to be fished with nets; they never fished that far up towards the head of the rapids. There was no suitable place there to fish with nets.

Q. Do you remember the Indians fishing there along these fisheries at the time you were there?

A. Yes; I employed Indians to catch for me. Had Indians hired under me the second year; also other Indians came there and caught fish.

Q. These others were independent?

A. Yes; without reference to what I was doing.

Q. So you know the places that are used for net fishing?

A. Yes; I think I know every one of them; I followed them up closely when I was there, all up and down along that Winans'
317 fishery, between the upper and lower wheel.

Q. Are there a few or many places at which to catch fish at a good stage of the water?

A. Upon the whole stretch of the rapids it would not in any one day be likely to have more than twenty places that would be good fishing points. I never used more than ten or twelve hands, Indians and white men, at any one time. There would, perhaps, be as many more nets operated by the Indians some days at different points up and down the rapids.

Q. The number of fishing places would be governed by the different stages of the water?

A. Yes.

Q. Were the Indians permitted by you to fish while you were there?

A. I had nothing to say with reference to it. They went and caught fish when they saw fit. If they worked under me I directed where they should fish and looked after them.

Q. You didn't object to their fishing there then?

A. No; I never did, unless they interfered with my men that were fishing. I objected to the interference.

Q. You may state any trouble you had with them at any time; how it arose, etc.

A. The first year I didn't have any difficulty with the Indians at all. I never had but one difficulty upon the fishery, and that was in 1888. I

think I had nine or ten nets working upon the front. I had three white men and one Indian fishing for me on the front, opposite the Indian village Wisham. The fish were running very rapidly and I was looking for points—that is, places to fish. I placed a white man under the ledge opposite this village, within about seven—where the water came within about seven or eight feet of the pocket of the ledge, placing a short plank upon a reef that projected from the main wall. I placed a man there to run a dip net, which was swung up the stream and floated down in the water. There were three different Indians came there and tried to use dip nets, with poles perhaps twelve or sixteen foot long, and
318 stood upon this ledge, above the head of the white man I had fishing there, and swiped the net down so as to clash with his net, which was making short strokes with his shorter pole, interfering with his work, and to some extent endangering his position. I remonstrated with each of those, telling them not to interfere with the man. They went off finally, as I thought these Indians had sought another Indian that was a stranger to me, to come and do as they had done—interfere with the man. I went and told him not to do it, not to fish at this place. I told him to go somewhere else and fish, not to interfere with this man. He persisted in fishing, and finally when he drawed his net out of the water to make another stroke he brought the pole down towards me. I took hold of it and told him to stop; not to do that. He stopped and turned around. I was talking to him about interfering with the man, and meantime the Indians in camp had been signaling to come down to the front. I noticed now a number gathering, but didn't catch on to their purpose. Finally they sent an Indian woman in, which gathered hold of me and gave some very frantic gestures. I told her to go away and let me alone. Then there was some kind of a whoop similar to a war whoop, and the fracas began. One of them came in front of me and gave me a shove with a pole. I gave him a shove with my fist. I was standing four feet from the water's edge when the melee began. I had been told their way of fighting in a place of that kind they would put a man right in the river; I was told that by my foreman. We had a fight that lasted about three or four minutes. I had one white man there to help. He was a pretty good fighter. The Dane I had there fired off a pistol, endeavoring to scare them, which was a mistake. The other man and I throwed three Indians in the river. I knocked the Indian down five times that had the fishing pole. I had my fist loaded with a rock about the size of a walnut, so it would take good effect. About three to five minutes after beginning, some of the old Indians hollowed, "Cuppet" (quit). I was never so glad to hear anything in my life. That is the only difficulty I ever had with the Indians on the fishery. From that on I had the reputation as a fighter here, and possibly that made a good change among the Indians.

319 Q. Were any of these Indians arrested?

A. No. I was arrested and fined for touching that pole. The other fellows with me were arrested; they were not fined; they were discharged.

Q. That was before Squire Gilmore?

A. It was appealed to the circuit court, and it also imposed a light fine. I believe the two with me were fined before the justice; that was also appealed.

Q. Are you interested in any way in that country now?
A. No.
Q. Have you been for several years?
A. No.

Cross-examination by Mr. ROBERTSON:

Q. Were you present when the building was torn down?
A. No, sir.
Q. How much land is cultivated right where that building is torn down?
A. Perhaps two acres.
Q. Is there any good pasture along that fishery for Indian horses?
A. The early pasture is fairly good; it soon dries up.
Q. During the fishing season is there any pasture along there sufficient to maintain their horses?
A. They kept their horses over the mountains; was certainly not very good.
Q. You simply mean by your testimony with reference to the change of the fishing stands, as the height of the water changes the location of the fisherman. Now, how many feet, as a general rule, how long was this pole?
A. He would vary the length of the pole according to the station he was going to occupy. One day it would be, say, eight feet long, and the next it would have to be over twelve feet long, using the same net. In the form of a set net the pole might be used twenty feet long. To answer your question more particularly, it would have to be just a little higher or a little way down the current. Some of the points would change so there might not be any fishing.
320 Q. There are a number of boulders and rocks along the shore that changes the current?
A. Yes; projections.
Q. While the flat rock would be submerged in the water along there a little nearer to the shore, further up would be a good place to dip in the current?
A. Going up the river along the shore would be a good place for a set net.
Q. How many fish a day could a man catch with a dip net and a good day's fishing?
A. That depends entirely upon the run of the fish along that point. If a man was working, you would figure that man was not making wages where he was fishing, he would change points, and if he could make wages there you would leave him for a lack of something better. I never had any extra heavy runs. I don't think I ever had a man catch a ton. If they got five hundred pounds, fishing was good.
Q. How much fish per day did you average?
A. During the season I wouldn't average over a ton per day.
Q. The next season you acted as manager?
A. It was a little better. I don't think I exceeded a ton on an average per day; some days a few hundred pounds; next day probably a couple of tons.

Q. Mr. Whealdon, what do you think about the run of the salmon; do the salmon run the same way all the time?

A. They are governed by the conditions of the water. They won't run against murkey water; in clear water they run.

Q. Can a man with a fish net see to fish and change his net to catch them?

A. No, sir.

Q. Did you have any men trying to spear fish?

A. No. It is confined to the Indian fishing, catching larger quality of fish; not a very rapid way of fishing. I have hired Indians to do gaff-hook fishing.

321 Q. Did you ever do any gaff-hook fishing?

A. I have not myself; I have hired Indians to do some.

Q. Are they successful?

A. Some of them are.

Q. What is a gaff hook?

A. It is made in the shape of an ordinary fishhook, parted at the points and turned to the side, with a shank on it of about three inches. In the end of the shank is a thimble-shaped ferrule that you put on the end of a pole; then there is a short line tied to the shank of the hook, the line being from 1½ to 3 feet in length, the other end is tied up to the pole passing through the ferule about three feet, just slack enough in the line by putting the ferule on the end of the pole to hold it there temporarily. You place that down in the water to a depth sufficient to get to the bottom of the water upon the ledge where the fish pass by, with the beard of the hook towards the rock wall. When an Indian feels the fish passing between the pole and the rock wall he jerks the pole up and gaffs the fish in the belly; the gaff slips off of the pole and the fish is hung on the gaff.

Q. Is that a frequent way of fishing?

A. No.

Q. Where do the fish deposit their spawn along the river?

A. I never witnessed that; must be on sand bars and shallow water in the rivers.

Q. What point with reference to the distance up the river?

A. There is a point up at Salido Falls, nine miles above these rapids; a great many spawn there on the gravel bars.

Q. What do you think with reference to the same fate returning to the same stream at any time after they have spawned again to the sea, if they get there?

A. I think they return.

Q. I wish you would state the different sources of information
322 you have in reference to salmon returning after going up the stream to spawn.

A. It is my own observation, except marks and scars I have seen on the fish—net scars—it is healed over. Sometimes you will catch fish that have old net marks on them that have healed up, evidencing they have been in the river years before and been hurt in this manner, and it healed up, leaving a scar on the fish.

Q. State what you know about the marking of any salmon to determine whether they return.

A. I have never performed that, but Commissioner Thompson established a hatchery in Rogue River, and after the old salmon had spawned he cut a "U" in the fin upon the back of the fish and turned them out in the river, and they would cut the same fin on all of the small fish to determine their habits. He said they would not get any small fish in the same stream until three years following, and that the old fish continued to come back season after season, some first, some second, and some third year—come back in the same stream having the mark upon them that the hatchery had placed there.

Q. Where is Rogue River?

A. Southern Oregon; heads in the Calipe Mountains and flows into the Pacific Ocean.

Q. How large a river is that?

A. Small stream; perhaps the size of the Yakima—that is, far up in the valley.

Q. Do you think from your observation of the net marks—do you think it probable the fish here have the same habits?

A. Yes; the fish that are marked here are big fish.

Redirect examination by Mr. MAYS:

Q. You say your information upon this subject is or is not borne out by the authorities on the subject?

A. My observation bears out the authorities I have inquired of on the subject of the habits of the fish.

Q. That the fish after that—the big fish or salmon, after spawning, do go back?

323 A. Yes; many of them go back.

Q. What proportion do you understand go back?

A. I don't know about that.

Q. Isn't it a very small proportion that ever go back?

A. That may be. The old theory that the old fish die at the head of the river I don't think is true.

Q. Have you ever been up towards the heads where the general spawning grounds of the salmon are and saw the dead fish there?

A. No.

Q. You have heard from various persons that there are many, very many, have you not?

A. Yes; very many fish die at the head of the stream is the statement of many.

Q. That is not the statement of one person, but persons generally that have examined that subject?

A. Yes; that is the statement.

Q. Very many people claim, who have investigated the subject, that they all die up there?

A. Yes, sir.

Q. Have you any other authority than Mr. Thompson?

A. No, sir.

Q. That was in this small stream?

A. Yes; Rogue River.

Q. Do you know that it is one-tenth as large as the Yakima?

A. I presume from its watershed it would be small like the Yakima.

Q. There are large salmon caught in the fall of the year, are there not?

A. They are more like a steelhead that goes there.

Q. The fishing at that river is in the fall of the river?

A. Yes, sir.

Q. They don't catch any salmon but a few miles out from the ocean, do they?

A. They don't make a business of it.

Q. Their hatchery is a few miles from the ocean?

A. I don't know just how far.

324 Q. The Rogue River, take it up in southern Oregon, is not fished at all, is it?

A. I have no knowledge except in the vicinity of the cannery; they have a cannery there.

Q. After you get out, say forty or fifty miles from the ocean, the stream is not very much larger than the little creek called Mud Creek here, is it?

A. I never crossed it; it is a small stream, though.

Q. Then, how far is their hathery from the ocean?

A. I think it must be about twenty miles.

Q. When you compare that river to the Yakima, you do it without any actual information?

A. Only judging from the watershed each of the streams have.

Q. Are there not the Umpquaw and other rivers out in that country that have the same watershed?

A. Yes; and other streams.

Q. What is the fact with reference to the way the fish are running during the fishing season as to being up or down the river.

A. As to the way fish run, they run upstream.

Q. All of them?

A. Yes; all I caught were going upstream when they were caught.

Q. Is there any time of the year when to your knowledge or to your information from any source that the fish, the old salmon, are seen or caught going down the stream?

A. I never have caught any that way or noticed any being caught that way.

Q. Have you ever heard of any being seen going down?

A. You can't see them going down; I never heard of anything of the kind.

Q. Take it down on the lower river, if any salmon are going out?

A. They would catch them in the lower eddies in the gill nets going the other way.

Q. You never heard it claimed by anybody they caught any going down?

A. Yes; I have heard that statement made by fishermen, they caught fish with the head down stream in the seines and in the gill nets.

Q. Any number?

A. Quite a proportion, a number of them, to show they were caught going down instead of up.

325 Q. Did you ever hear more than one fisherman say that?

A. Never did.

Q. Many to the contrary?

A. A great many claim otherwise.

Q. Don't you know it is a fact that the fish when he enters the stream is very different than when he gets up here?

A. He grows thinner; he is in a better condition when he enters.

Q. When you say the Indians kept their horses over there, you may state whether they kept them exclusively upon the range up there or trespassed upon the fields of the whites.

A. They turned them loose, sometimes turning them in the field; at least, I have caught them in the act of doing that very early in the morning when they were getting them out.

Q. What was the conduct of the Indians generally with reference to making trouble that way?

A. They were a little troublesome with reference to their horses.

Q. How about their drinking?

A. They drink quite a good deal during the fishing season; some of the local renegades drink and fight among themselves.

Q. What do you know of the Indians disposing of the salmon, or a portion of their catch?

A. They hauled them to town and sold them, apparently a good many of them.

Q. You say they hauled them; do you mean hauling in wagons?

A. Yes; took them to the cannery.

Q. Was that their conduct in that respect during the time when you were over in there?

A. Yes.

Q. Do you know whether it has been since that, part of the time?

A. Yes; I frequently see them bringing fish in. I saw them hauling them away while I was there a good many times by wagon loads. Some prefer to hire out for wages to fish, and do so.

326 Q. That grass in that locality over there is such that it is of particular value only in the early spring?

A. Well, no; not of any value then; it dries up; it is an early grass and is worthless when dry.

Recross-examination by Mr. ROBERTSON:

Q. Mr. Whealdon, I will ask you if your observation does not bear out this theory with reference to the fish running upstream: That in small streams the fish leaving the ocean run up over rocks and against obstacles that scar them very badly, and they go far up the stream and deposit their eggs. In many instances these little streams get smaller; the fish being headed upstream they die because of getting out of water of sufficient depth to go on farther.

A. My observation with reference to salmon is strickly local; my information with reference to them comes from various ways similar to which you suggest, much of which I think is unreliable. By returning they thump themselves out on the bars and get bruised and die.

Q. That wouldn't be liable to occur where the water is deep and sufficient for the fish to travel in?

A. No; they have to go where there was shallow water and gravel bars.

Q. Have you ever caught any fish that apparently had finished spawning?

A. Yes, sir.

Q. How far is it from here to the mouth of the river?

A. Two hundred miles by the river.

Q. Do you believe that some of the fish spawn before they get here?

A. The late coming might spawn before they get here. I don't think many of the chinook salmon this point.

Q. Do you think all of the fish that run up this river go up to spawn?

A. That is said to be the nature of the fish—seeking spawning ground causes them to go into the stream.

Q. You don't have the idea that a fish that spawns would die because it did spawn, did you?

A. No.

327 Q. In lakes and other places where fish are that don't run upstream to spawn, have you ever heard of them dying immediately after the spawning season?

A. I have not.

Q. Where is the points that the salmon spawn going up the Columbia River?

A. Low water, as near as Salido Falls, fifteen miles above here.

Q. You have seen them trying to get up and fail, haven't you?

A. Yes, sir.

Q. How great are those falls?

A. Vary from ten to thirty feet; some channels are very swift and the fish do not have sufficient strength to ascend the falls, and lay in the pools below.

Q. These fish from the time they leave the mouth of the Columbia don't eat anything at all, do they?

A. They are said not to.

Q. The canneries that catch fish nearest to the mouth of the river get the fattest fish?

A. Yes, sir.

Q. Up here the fish are poorer?

A. Yes, sir.

Q. These fish are less able to go up the stream farther, and they go back to the ocean?

A. They are not so strong when they get here as they are when nearer to the salt water.

Q. How much ground is there along that fishery, from the big eddy up to the head of the rapids that is good for the raising of produce to support Indian life?

A. Do you mean ground upon which they catch salmon?

Q. No; upon which they can grow produce.

A. How far back from the shore?

Q. Well, quarter of a mile.

328 A. Quarter of a mile along that front may be twenty-five or thirty acres. The ground which Winans own can't be more than five or six acres, maybe not that.

Q. The only garden spot on that place now is the point where you say these Indian houses were built and were pulled down?

A. Little more, I suppose; Indian Joe, Silatsi, outside of that place——
Q. Outside of that place where Winan now has his fish wheel, how many other places are good productive spots?
A. A small one near the mouth of the eddy I am talking about on Winans' ground, another one where Winans' house is, then right back from these points go back a quarter of a mile, more than that may be, cultivate twenty-five or forty acres.
Q. All along the shore, next to the river, is besaltic rock, isn't it?
A. Yes; except the spots you mentioned.
Q. The waters wash over it frequently?
A. Yes, sir.
Q. The other points are rocky points and barren?
A. Yes; utterly so.
Mr. ROBERTSON. That is all.
Mr. MAYS. That is all.
Examination closed.

LINNEUS WINANS, one of the defendants, being duly sworn on their own behalf, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, residence, and occupation.
A. Linneus Winans; age, 45; residence, Klickitat County, Washington; occupation, fisherman.
Q. Are you one of the defendants?
A. Yes, sir.
Q. When did you first have anything to do with what is now called Winans' fishery?
329 A. Summer of '89.
Q. Have you had to do with that continuously ever since?
A. Ever' fishing year.
Q. You and your brother?
A. Yes, sir.
Q. Are you the defendant who lives on the ground in question?
A. Yes, sir.
Q. Have you a family residence there?
A. Yes, sir.
Q. And family?
A. Wife and two children.
Q. How long have you resided on the land with your family?
A. Since '92, including '92.
Q. Have you a residence there, house and all other incidental houses for living?
A. Yes, sir.
Q. Stable?
A. Yes, sir.
Q. Garden and orchard?
A. Few trees, small orchard, and a garden spot.
Q. About how many acres have you in cultivation?
A. About two.
Q. How long have you been cultivating it?
A. Since 1893, including 1893.

Q. Have you that land enclosed?
A. Yes, sir.
Q. About how much land have you there altogether enclosed?
A. It was never segregated.
Q. About how many acres?
A. Less than 100 acres; seventy-three, somewhere along there, along there I suppose; it has not been segregated.
330 Q. How many fish wheels have the defendants there, and what kind of fish wheels are they?
A. Four; three stationary wheels and one scow wheel.
Q. Is the scow wheel stationary or not?
A. No; the scow wheel is not stationary.
Q. You mean the wheel is located upon a scow or beside a scow?
A. No; it is located on the stern of a scow; floats around with the scow.
Q. The anchored scow gives it temporary permanence?
A. Yes, sir.
Q. About what distance are those wheels apart, giving the location of the upper one and describing them along down the river?
A. The scow wheel is located at the upper end, extreme upper end of this rapids, and about a half or three-quarters of a mile below comes the first stationary wheel, and then another quarter of a mile another one, then another quarter of a mile would be the last one.
Q. Can you state about what those wheels cost to build them, take the entire cost, by giving a rough estimate?
A. Somewhere between twelve and eighteen thousand dollars, somewhere along there.
Q. Can you locate a wheel wherever you please?
A. No; there are certain places where you could locate wheels, but it would be useless, for they wouldn't operate for lack of current; other places where you get the current it would not remain there.
Q. What would prevent it from remaining there; would the high water have anything to do with it?
A. High water washing the drift wood on it.
Q. Have you had trouble up there retaining your stationary wheels?
A. Yes.
Q. Lose any of them?
A. Yes. The year '94, lost them.
331 Q. About what is the usual annual rise there?
A. I have no way of measuring. On my side of the river shows between seventy and eighty feet, the usual rise; that is on the gages the Government put up—I am told the gauges are there.
Q. Where are those several wheels located with reference to the patented land along it or on shore land in front of the patented lands?
A. The wheel is on both; the line divides part of the works on the shore land, and part of the wheel on the other land.
Q. Do any one of them stand entirely upon the patented land?
A. I am not sure but what one of them does; I am not right sure it does.
Q. Which one would that be?
A. The big wheel.

Q. The lower one?

A. The lower one. By saying that I am not sure what the meander line is; they didn't take a true survey, but we take the Government meander line for the shore line, regardless of where it is situated.

Q. You mean regardless of where they surveyed the shore line?

A. Yes; they corrected the maps there.

Q. How is the shore generally along there, as to being receding or otherwise?

A. Most of it receding and very irregular.

Q. About how far from the river in a general way would be the fish wheels at low-water mark?

A. Some of them quite a ways; some standing above the water and not far away; others stand quite a ways back.

Q. All would be standing at low-water mark on dry ground?

A. Except the scow wheel.

Q. Would the water touch the other fish wheels until after it had risen?

A. No; would have to raise very nearly forty feet.

Q. Does the water raise so as to overflow the ground where the wheels are located?

332 A. Yes; three of them it does in extreme high water. There are two of the stationerys; one is cut off entirely this stage of the water by one hundred yards or more, maybe two hundred.

Q. When the water is anything like its maximum height would it be possible for the Indians to go where the fish wheels are located on account of the high water?

A. There is only one wheel they could get to at the present stage of the water.

Q. When it gets higher?

A. No; not when it reaches high-water mark or along there; there is one wheel they can get to at this stage; when it reaches 76 or probably five or six feet higher than the water is now they can't reach any of them.

Q. Cut off entirely?

A. Yes, sir.

Q. Are there many fishing points along your fishery?

A. At times there are.

Q. Are those fishing points permanent or temporary according as the water changes?

A. They are never permanent; they follow up and down the stream or straight up and down both.

Q. In locating your various wheels, you may state whether or not they were located in any regular fishing place.

A. There is no place where you might not catch salmon, and there is no place where you positively could catch salmon when the conditions are all right. In 1894 we caught them where no mortal ever caught them before in the garden.

Q. How far would that be from the nearest fishing wheel?

A. One hundred and fifty or two hundred yards from the shore; inshore from the fishery that stands on the highest ground.

Q. Are there fishing places or places to fish between the various fish wheels?

A. Yes, sir; lots of places between. We fish anywhere and everywhere, according to the condition of the water and the run of the fish.

333 Q. Have you fished with nets and have the Indians fished with nets between the wheels successfully?

A. Many times both the Indians, myself, and my hired men.

Q. Have any of you had any altercations with the Indians, any quarrels?

A. Now and then an old woman would give a fellow a jawing; no Indian man would ever say anything; no quarrels whatever between me and the Indians.

Q. In excluding them from the fisheries there, what action did you take?

A. After talking to them through interpreters, and talking to them myself, those that could understand, I had resort to trespass suits, just a couple.

Q. Were they fined for trespass?

A. Yes, sir.

Q. How much, do you know?

A. The lowest that could be put upon them—the lowest that could be put upon them—five dollars; that is the lowest limit in Washington.

Q. Has that ever been collected?

A. No.

Q. Have you ever threatened them in any way other than to invoke the aid of the law in case they didn't stay away?

A. No; only with the law.

Q. Have they fished there, more or less, with your permission, at times?

A. Yes; I don't remember ever refusing one of them, when he asked permission; I never interfered with them unless they were interfering with my work; I don't remember hindering any man if he asked permission.

Q. Did whites ever fish there?

A. Sometimes.

Q. That with your permission?

A. Yes; sometimes.

Q. Do you know of Indians selling fish there?

A. I know I stopped one Indian making a market place out of my ground for white men, for hauling away fish; I never saw an actual sale occur.

Q. How did they haul them?

A. Wagon.

Q. How long ago is that?

334 A. That has been——I have seen that going on since and including 1892, up to to-day, except last year; I believe I wasn't at the cannery last year. During the fishing season I have seen them hauling away and carry away on horseback every season.

Q. In your conversation with them about the fishery, have you ever talked with them in any way about their going up above and fishing where they could fish?

A. I used to tell them to go to what is called Rapid Island.

Q. What is that?

A. Ten-mile rapids.
Q. What reason did they give about not going up there?
A. Some said too far, and some said no fish there—the latter remark I knew not to be true.
Q. About how far was it in fact?
A. Four miles.
Q. Is there an Indian village there opposite what is called Wisham?
A. Yes, sir.
Q. Since you have been there, has there ever been any other than the one village there?
A. No.
Q. About how many persons, if any, reside there at Wisham permanently?
A. I think about three families; last winter probably more staid there; two families consisting of two old ladies and three ordinary families that used to stay there all the time—from one family to three has been there until the last winter; probably I saw smoke issuing from five places there, two occupied by old ladies.
Q. Has there ever been any change in the number of Indians that came there to fish from '95 up two years ago, as to increasing or decreasing?
A. I don't think so many fished the last two years.
Q. I am speaking of the number that came to fish from '89 up to '95?
A. My knowledge of the place is that these outside Indians didn't come there to fish; didn't know how to handle a dip net or where to put it.
335 Q. Where did they fish?
A. They traded flour from Yakima, so these Indians told me, for salmon; they didn't fish when they came over.
Q. Have they any time, during the time they have come there?
A. Probably they come out and take a round a little to find a proper place, they didn't do what we call fishing, not like those who live here; those that live here are the only ones that can fish in reality.

Cross-examination by Mr. ROBERTSON:

Q. Mr. Winans, if the Indians can catch fish there between the wheels and the wheels do not interfere with them, what is your objection to permitting those Indians to fish and to permit these Indians to fish along that ground?
A. I have serious objections to permitting anybody to fish if I don't see fit; I didn't buy into that property to make a donation out of it.
Q. That is the point, then; the reason is whether there is good fishing there or not you wouldn't permit those men to fish there?
A. I have done so.
Q. You have done it only as you saw fit?
A. I don't admit their right to fish there.
Q. They are claiming the right to fish?
A. I know they are.
Q. Now, your fish wheels cost you about fifteen thousand dollars?
A. I think so.
Q. You put in that as an investment, did you?
A. Yes, sir.

Q. You believe this to be a valuable fishery, do you not?
A. Yes, sir; I think it is.
Q. You believe it to be the most valuable on the Columbia, don't you?
A. No.
Q. Where is the fishery?
A. The Cascade gets away with it.
336 Q. Where is the Cascade?
A. Below here, they get the first dip.
Q. You catch what they leave?
A. Indeed we do not.
Q. Some of them?
A. Some of them; yes.
Q. While it is true you didn't have any trouble with the Indians, you hired an Indian to put the Indians off?
A. No.
Q. Didn't you hire an Indian by the name of Charley Dick?
A. No.
Q. Charley Dick testified that you hired him to keep all the Indians off. There is testimony in this case that Charley Dick was warning Indians off from time to time; did he do this with your orders?
A. Of course he could say anything he wanted to.
Q. Your idea was to impress them that they should not come there?
A. Yes; without permission.
Q. You heard them testifying about going to that spring?
A. Yes, sir.
Q. Did you prevent them from going to the spring?
A. No; they went there every day.
Q. That spring is just under the line?
A. Yes, sir.
Q. You fenced it in?
A. Yes, sir.
Q. You could easily have fenced in on the outside?
A. It is twenty feet under or on my land.
Q. You say when the water is high the Indians could not go to the fish wheels to fish?
A. No; when it was at high-water mark.
Q. At certain stages there is no fish there at all?
A. No.
337 Q. So the water might be so high that fishing with both fish nets and fish wheels is not satisfactory?
A. Yes, sir.
Q. The medium station is where you have your gear arranged, not extreme high or low?
A. Yes, sir; that is right.
Q. Now, you have hired men to fish with nets along that place?
A. Yes, sir.
Q. How many men at a time?
A. I think twenty dip nets in 1894; that was the highest.
Q. Have you any dip nets running now?
A. No.

Q. Why?

A. Not profitable; couldn't catch enough to eat.

Q. Why have you not permitted the Indians to fish there and take out what they see fit to eat?

A. One reason it is impossible.

Q. I will ask you if this is not a fact—all along that fishery is rock and you fenced in the fishery from above the Indian villiage down to the big eddy?

A. Yes, sir.

Q. You run that fence right between that Indian villiage and the river?

A. Yes, sir.

Q. You 'now all these Indian trails lead into the Indian villiage you have heard testified about?

A. Yes, sir.

Q. What place is there for those Indians to go to that come there except go back up the hill? They can't get to the river at all?

A. No, sir; without going over that fence.

Q. Your ownership of that property has absolutely debarred those Indians of the opportunity to fish, if you are correct?

A. Yes, sir.

338 Q. You do not concede the rights of those Indians to fish in common with you?

A. No, sir.

Q. You say they have no rights to fish there, whatever?

A. No, sir; Indians or whites.

Q. Do you permit those Indians to travel that trail at all.

A. Yes; I give them the wagon road.

Q. I mean between your house and the Indian villiage?

A. Yes, sir; unmolested.

Q. You don't let them get to the river?

A. Yes, sir.

Q. They travel wherever they please, only they don't get to where the fish are. Is that right, Mr. Winans?

A. They don't cross my land to go to the fishery.

Q. You bought this land for a fishery, did you not?

A. Yes, sir.

Q. Chiefly valuable for a fishery?

A. Certainly.

Q. No agricultural lands of any consequence on it?

A. No, sir.

Q. Your garden is not now over an acre and a half, is it?

A. I think four acres.

Q. How many acres do you own along that fishery?

A. I think seventy-three acres, irregular lines.

Q. You simply bought a little strip from each of the owners along the water front to get to the fishery?

A. Yes, sir.

Q. You knew these Indians were in the habit of fishing there when you bought these lands, didn't you?

A. I didn't know much about what their habits were, but I soon found out after I bought the land.

Q. Hadn't you been there before you bought the land?
A. Yes, sir.
339 Q. You heard Frank Taylor tell about that suit he had?
A. I left and went home just as he went on the stand.
Q. In whose name is your property?
A. We have a bond for a deed.
Q. Who is that bond from?
A. Tyley Woodward.
Q. Who did Woodward buy from?
A. O. D. Taylor; he leased the land.
Q. Who did Frank Taylor?
A. I don't know.
Q. Now, is there any agricultural lands sufficient to support these Indians along these fisheries?
A. No.
Q. There is some at the village where they lived, isn't there?
A. If you go back far enough there is agricultural land, if you go back an eighty.
Q. It is not being cultivated now is it?
A. Some places.
Q. The land is good just as pasture land?
A. It is good; very fertile.
Q. The first forties are very rocky.
A. Yes; the first forties are very rocky.
Q. You saw this village these Indians were living at?
A. Yes, sir.
Q. You fenced in front of the village, between that and the water.
A. Yes, sir.
Q. When was that?
A. 10th of last August, I think it was it was finished.
Q. Why didn't you leave one hundred yards for the Indians to fish without fencing it in?
A. I didn't see fit to make a donation of it.
Q. Didn't you know that under the treaty with the Indians and the law they claim a right there?
340 A. I know what they claim.
Q. How long have you known that?
A. Since about '94 this Simpson (Captain) began to talk to me; finally White Swan (Joe Stwire) came down.
Q. You say some of those Yakima Indians can't fish at all.
A. Very few of them can fish.
Q. Some said they were raised here and moved from here to the reservation?
A. I don't know of any wild Indians that can fish, what we term wild Indians.
Q. Why?
A. It takes an expert to know when and where.
Q. Most Indians are expert in catching fish in a primitive way, and you never saw a white man that could catch a fish with a spear?
A. Yes, sir.

Redirect examination by Mr. MAYS:

Q. Have you ever at any time objected to the Indians fishing in the river, provided they would not molest or trespass in any way upon your lands there?

A. No, sir.

Q. Are you perfectly willing now they should fish in the river, provided they won't trespass on your land?

A. I am, and have often invited them to use their royal privilege in that respect.

Q. Mr. Winans, this Indian village is located upon Government land, is it not?

A. Yes; it is.

Q. You have no claim upon it?

A. No.

Recross-examination by Mr. ROBERTSON:

Q. Mr. Winans, has the Government ever surveyed this land to see whether or not the Indians have the right of egress to the river there?

341 A. I was going to say that stakes have been driven so thick there the smartest man in the world couldn't tell where the lines are.

Q. Some lines run themselves to the river?

A. Yes, sir.

Q. But you have taken the bull by the horns and fenced to the river?

A. Three different competent county surveyors have run those lines there, and the fence is built in accordance with their surveys.

Mr. ROBERTSON. That is all.

Mr. MAYS. That is all.

Examination closed.

AUDUBON WINANS, one of the defendants, called and sworn on their own behalf, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, residence, and occupation.

A. Audubon Winans; age, 47; residence, The Dalles, Oregon; occupation, fisherman.

Q. You are one of the defendants?

A. Yes, sir.

Q. Where do you live with reference to what is called the Winans fishery?

A. Across the river in Oregon and about one mile below.

Q. How many wheels have you there?

A. Four.

Q. Character?

A. Three stationary and one scow wheel—everything we have.

Q. I wish you would indicate on the map now, in ink, the location of the various wheels, as nearly as you can.

A. The lower wheel is marked with an "X," and lower wheel next above also marked by X, and second wheel, third wheel, marked by X,

and third wheel, scow wheel, is marked with an X by the witness and written "scow wheel" opposite.

Q. Does the plat on which you have written, as above indicated, purport to be a full copy of the township plat other than immediately along the fishery?

342 A. It does not.

Q. You had it prepared with reference to showing the particular matters in controversy, did you?

A. Yes, sir.

Q. And the proposed railroad?

A. Yes; that is right.

Q. The entries on the other land, except along the river, is not indicated?

A. That is right.

Q. Examine the map and state whether or not the place where the pass is indicated is where the various trails pass through between rock bluffs is properly indicated.

A. It is very nearly right; it is indicated a little too far south towards the fishery; should be trifle farther up.

Q. It is approximately correct?

A. Yes.

Q. Indicate on the map also about where you brother's house would be.

A. "X," marked "residence," in red ink; at the place marked "X, residence" in red ink, is substantially correct.

Q. Is the point at which the Indian village was located by the witness, Taylor, substantially correct?

A. Yes; substantially correct.

Q. About what have those wheels cost you?

A. Including the entire cost, placing and replacing them again, the cost was about fifteen thousand five hundred dollars—that is close to it—close to sixteen thousand dollars. Understand, I want to qualify it, that the replacing of the wheels, part of the work was there from the old wheels, that was taken out the cost of the old wheels, was twenty-one thousand; these were washed out in the flood of '94.

Q. Did you have difficulty in selecting places there where you could get the wheels to stay?

A. There are only a few places that you can make fish wheels stand in The Dalles of the Columbia.

343 Q. What has been your success in the matter of catching fish during the time you have handled that proposition?

A. There has only been a few seasons that has been anything like a good run.

Q. What has been, or what is the condition of the shores along there as to being receding or otherwise?

A. The majority of the shore line there is very receding, that is, the shores only rise there about eighty-five feet.

Q. Are there any permanent, definite location as fishing places, or do the places for catching fish change from time to time up and down the shore, and up and down the river, according to the stage of the water?

A. They change with every changing stage of the water.

Q. Is there any smooth surface of shore along there, or is it higher or lower?

A. It is exceedingly rough, higher or lower, and in benches, and while the water is on these benches to-day it isn't deep enough to catch fish, and to-morrow it may be too deep. As the river rises or falls they change with the depth of the water, to fish.

Q. Will there be lower ground behind higher ground along the shore?

A. Yes, occasionally rocks stick up to-day; there is an eddy heads up at this rock. When it is two feet higher that eddy may head up seventy-five feet.

Q. Is there any such a thing as definite, permanent fishing places any where along there?

A. No; we have places only when the water is medium stage, that is, *straight, short places twenty feet long between two lower fish wheels* that can be fished ten or twelve days; while the water is rising, or when running around in the inside, you are crowded out in the river.

Q. Is the Indian village there at Wisham upon any land claimed by you?

A. No, sir.

Q. Ever enclose it in any way or form?

A. No, sir.

344 Q. What have you ever done in the way of preventing Indians from fishing there?

A. All we have done is to build fences last season; excluded Indians and whites.

Q. You had fences there before?

A. Yes; this was a continuation of the old fence; we repaired it and put it in good shape; made a lawful fence.

Q. Have you given them notice to keep out side of the enclosure?

A. Yes; no special notice to Indians; trespass notices were to every body; we gave verbal notice to Indians along there.

Q. Did you ever talk to them about going to any other fishery above there?

A. Yes, sir.

Q. What, if any, excuses have they made about that?

A. I have only talked with a few; they said it was too far to take the fish to town.

Q. Do you know of the Indians selling fish up there?

A. Yes; bought fish of the Indians, and I knew of them selling to other people.

Q. Have you ever objected in any way to their fishing in the river without trespassing upon your lands?

A. None, whatever; so long as they kept off of our premises.

Q. Do you know whether, during the time you have had to do with that fishery and up to the time when you excluded them, except by permission, there was any increase or decrease of the number who came there to fish?

A. I think there has been a decrease since '89; there has not been quite so many come there to fish. There has been no decrease, probably, in resident Indians that did fish there; there has been a decrease in the number of Indians that come there to fish.

Q. What claim did the resident Indians make about the fishery, as between them and the other Indians that come there to fish?

A. They claim to be a different tribe; they claim to own the fishery and that the Yakima Indians that come from the reservation have nothing to do with it.

345 Q. Did they trade between themselves with salmon?

A. They sold the Yakimas salmon. There are very few packed; they are taken out mostly in wagons.

Q. Indians take them out in wagons?

A. Yes, sir.

Q. Take them out in wagons to the cannery?

A. Yes, sir.

Q. Fish they sold you, were they taken out in wagons?

A. They packed those right from the fishing station to our scales.

Here witness withdrawn, and A. H. CURTIS, a witness on behalf of defendants, was called, and, being duly sworn, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, residence, and occupation.

A. A. H. Curtis, 65 years old; reside over in Klickitat County.

Q. Just across the river?

A. Yes, sir; Rock Island.

Q. Occupation?

A. Well, I am operating the Diamond Flouring Mills in The Dalles, and farming across the river.

Q. How long have you lived over in Rock Island?

A. Since 1859.

Q. Did you live here just prior to that time, and how long did you live here?

A. Well, I came here in 1855.

Q. And lived here until you moved over there in 1859?

A. Yes, sir.

Q. In 1855 was there any persons residing over in Rock Island or the Klickitat Valley, or any of the country between the Columbia and Simcoe Mountains?

A. No; I think not. I am sure there were no settlers—some miners passing through sometimes.

346 Q. In what year did the settlements begin over in that locality?

A. Well, in the spring of '59 or in the fall of '58; about that time.

Cross-examination by Mr. ROBERTSON:

Q. Was this fishery known at that time, where Winans' wheels now are?

A. Yes, sir.

Q. What was the name of the fishery?

A. Well, it was called Tumwater fishery.

Q. The water that runs there is known as The Dalles—The Dalles and the Columbia River?

A. Yes, sir.

Redirect examination by Mr. MAYS:

Q. Were there other fisheries in other localities on the Columbia River along there?

A. Not very far; they extended a half a mile or so up and down The Dalles, is all I know about it at that time.

Q. There was some fisheries down the river, was there not?

A. Yes, sir.

Q. And some up about Salido?

A. Yes, sir.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

Mr. WINANS, being recalled on direct examination:

Q. The Indians that reside permanently over there at the Indian village, have they or not general claims or farms?

A. Yes, sir; most of them have.

Q. Do you know whether there are fishing places between your place and Salido, where the Indians can yet fish without any obstructions there or in reaching there?

A. Yes, sir.

347 Q. Are those the places you referred to a while ago when you said you talked with the Indians about why they didn't go there to fish?

A. Yes, those are the places; they are very good places to fish, a little farther from The Dalles market and the local cannery people.

Q. Are there other fishing places below where your fish wheels are?

A. Yes, sir.

Q. Places where the Indians fish?

A. Yes; in times of high water.

Q. Do you know any above lot four in section nineteen?

A. No, sir.

Q. Would you and your brother be willing to dispose of your fishery at a reasonable price?

A. Yes, sir; we have nothing in the way of property but what we would sell at a fair price; we are always in the market for a trade.

Q. You never had any thing to do with tearing down any Indian houses?

A. No, sir; never tore any down in any way or description.

Cross-examination by Mr. ROBERTSON:

Q. You say you are willing for the Indians to fish, provided they don't fish on your land?

A. Yes, sir.

Q. Provided they don't fish all the time in front of your land?

A. Yes, sir.

Q. So they have got to go clean off the fishery known as the Se-we-paum, Wisham and Tumwater to fish; they got to go off the land between the big eddy and the upper rapids to fish to your satisfaction?

A. Yes, sir.

Q. How would they fish with nets?

A. No particular way without standing on the land.

Q. You have the monopoly, by reason of your ownership of the land?
A. Yes, sir.
Q. These little black dots along the front of this plat shows where you built your fence?
348 A. No; that is not right.
Q. Approximately?
A. No.
Q. Can you draw the line of the fence there?
A. The fence is not indicated on the map at all.
Q. The fence runs along in a circuitous course from the eddy to the upper rapids?
A. The fence runs along close to this railroad, pretty close to that line of that railroad until here, to that line, the south west corner of lot five in section nineteen, from there it runs north along this line up to here, along the middle of section nineteen, half way to the middle of the section then it runs due east to the river.
Q. You won't let these Indians fish at all, along that fishery by nets, spear, or gaff hook?
A. Not without they are fishing for us.
Q. The Indian village is one hundred yards about, from the river, is it not?
A. Yes; in one direction, not in the direction that the Indians would seek to go to the river for fishing purposes?
Q. I mean direct from the river it is one hundred yards?
A. I would like to explain that to you.
Q. About one hundred yards from the river is the Indian village?
A. Yes, sir; about one hundred yards.
Q. And between that Indian village and the river your fence runs?
A. No, sir; it doesn't.
Q. Can the Indians go right to the river?
A. They can.
Q. Is there any fence at all there?
A. No fence at all.
Q. Either high or low water?
A. No; if you will give me the map I will explain that matter to you. This Indian village is scattered along up here until it passes the north line of lot 5, section nineteen; there are some times along down to here——

(Question modified.)

349 Q. Mr. Winans, is it not a fact that the Indians can not go from the tract marked "Bill Charleys" tract over and across lots two and three in section thirty, township two north of range fourteen east directly to the river on account of the fences?
A. That is true.
Q. There is a fence between that point and the river?
A. Yes, sir.
Q. Where is that little spring; on what lot?
A. Lot five in section nineteen.
Q. How many acres of land along this fishery do you own?
A. That is hard to tell; it is above seventy acres somewhere.
Q. You acquired this for fishery purposes?

A. Yes, sir.
Q. No agricultural land on it?
A. None of consequence.
Q. On the outside about two acres?
A. Yes; that is about all.
Q. Man couldn't make his living on that land?
A. Agricultural, no.

Redirect examination by Mr. MAYS:

Q. From the Indian village, can the Indians reach the river on the east?
A. Yes, sir.
Q. Is there anything to prevent them from doing so?
A. No.
Q. Can they reach there with their horses?
A. Yes, sir.
Q. Did they ever fish north of lot five and near the north end of the Indian village along there?
A. Not with dip nets. I believe at times I have seen them in there with gill nets; no dip nets; I think one or two have gill nets.
350 Q. Did I understand you to say on cross-examination that your fence followed along the line of the road, line marked C. R. & N. Co. R. R. up to the southwest corner of lot five, section nineteen?
A. Approximately so, along there.
Q. Then your fence doesn't run immediately along the river except where the line of the railroad comes near to the river?
A. Doesn't run right immediately along the river, no; there is considerable space between the railroad and the fence.
Q. What would be the widest place from the river to your fence?
A. The widest?
Q. Yes.
A. I think a quarter of a mile; may be a little more on lot five; may be a little more than a quarter of a mile.
Q. Where does the fence run down at the lower end near the lower wheel?
A. The fence doesn't run to the lower wheel. There is a place the fence changes a little below the line between thirty and twenty-five; that bluff forms the fence; there is no fence from there down; this rim rock forms a fence from there to the wheel.
Q. Is the bay wheel the lower wheel?
A. Yes, sir.
Q. Has there ever been any enclosure so as to prevent the Indians reaching the river on the east from the north end of the village?
A. None that I know of.
Q. There is not now?
A. There is none now.
Q. When the fishing wheels are being operated, are there other fishing places between them and by them where fishing nets or dip nets may be used?
A. Yes; we very frequently use nets between the wheels.
Q. Do you catch anything?
A. Yes, sir.

Q. Which way do the fish run, up or down the river during the fishing season?

A. Up the river.

351 Q. What has been your experience with reference to the catch of the wheels above or below, the higher or the lower?

A. It don't make much difference, I don't know that it makes any difference; the wheel catches so few that pass through the opening the wheel is working in that you can't make any calculation of the catch, sometimes the upper and sometimes the lower; it depends; to-day may be running near the surface; the wheels are away up in high water; when they come to the first wheel they are running deep. The first wheel won't get them at all and the other wheels will do far better.

Q. Are the wheels located with reference to fishing places, good fishing places, or with reference to places where fish can be taken and the wheel set?

A. With the view of being able to maintain them; also places fish would be likely to pass. Some wheels are built on the Columbia River that take no fish; they never run near to the surface to be taken; you can't tell where they run.

Q. Are the wheels adjusted so you may fish at different stages—you take the wheel off the frame and work any time as the water goes down, and go down with it?

A. Yes, it goes up and down on the frame with the water, sometimes the Columbia moves the frame for us.

Q. That is the one important thing to look after?

A. Yes, sir.

Q. You have to be very careful when you put the wheel up or you will lose it entirely?

A. Yes, sir.

Q. Are the wheels located, any of them, at any of the specially good points for net fishing?

A. Yes, there is one of them located at what you might call the only special point there is there, that is the big wheel near what the Indians call Se-we-paum. The reason that is specially good at low water when the water is from fifteen to eighteen feet deep below the fish wheel there is a chance to go outside and spear—the only spearing ground at low water at the whole fishery. We never used to let the Indians use it late

352 in the fall; that is the only permanent place that was good any length of time. They use that station in August down as far as thirty feet below to late through the fall; the river is never within fifteen feet of getting into the wheel; outside is a place that may be termed a spearing place during the fall.

Q. How is that during the spring?

A. Under water fifty feet now.

Q. The water isn't up to its maximum height now, is it?

A. No.

Q. Take it during the first of the fishing season?

A. No, sir; it is during the last, that is the only place there.

Q. Could that be used at all during the spring fishing?

A. No. On a special kind of fish, never has been, can't be.

Q. Does the wheel in any way interfere with that?

A. No, it is from fifteen to thirty feet above this fishery.

Q. Did the blasting or anything you did there interfere with that?

A. No, sir; in no way changed it.

Q. That is the rock you have heard so much testimony about?

A. It stands there to-day intact; it is under the water forty feet to-day.

Q. Did any of the work which you done such as would interfere with the net or other fishing just on the particular ground where the wheel is located?

A. No, sir. It does not interfere with net fishing. Just where it is set you can't catch anything. I doubt if there has been a dozen of fish caught there with a dip net for all time.

Recross examination by Mr. ROBERTSON:

Q. You heard of Mr. Seufert being offered as much as one hundred thousand dollars for one wheel?

A. Yes, sir.

Q. That is right opposite you?

A. Yes; that is opposite our scow wheel.

353 Q. Who did you get your land from?

A. Tyler Woodward.

Q. Who did he get that property from?

A. O. D. Taylor.

Q. Who did Taylor get it from?

A. Daniel Ross.

Q. Who did Ross get it from?

A. Frank P. Taylor.

Q. That is the Frank P. Taylor that testified here?

A. Yes, sir.

Q. If you permitted the Indians to fish in front of your wheel it would not interfere with you, would it?

A. Well, every fish you take out we would have a chance at; you take one fish out of the river and we have one less chance.

Q. They would not interfere with you, would they?

A. It interferes with us more or less to have our gates left open and fences torn down. Even if it does not, that is merely one of the annoyances.

Q. The main reason is you don't want any body there to take those fish?

A. That is the main reason. Often times fish are brought here damaged, and we can get a better price for fish if no such fish are brought to The Dalles.

Q. This big rock was not only a place for spearing, but also for dip net?

A. No; I think not.

Q. I don't mean low water.

A. No; you couldn't get on it in high water.

Q. Where you have the big fish wheel you could dip below there, couldn't you?

A. Yes; about two hundred feet below there you could dip.

Q. You wouldn't catch as many fish with a net there when the water was rising as when it was falling?

354 Q. There is a wheel below there, however?

A. Yes, sir.

Q. You don't agree with Mr. Seufert that it will catch all the fish that are in the trap?

A. You misunderstood Mr. Seufert. The fish that go in the basket stay there; there are three baskets on the wheel; even when your wheel is fishing, there is a twelve-foot opening in the wheel that exists one-third of the time.

Q. How many revolutions in a minute does this make?

A. That depends on the velocity of the current; some three turns per minute, some two, some one and a half.

Q. That would be twelve times in a minute that the basket makes a dip?

A. Yes; according to the number of revolutions in a minute.

Redirect examination by Mr. MAYS:

Q. When the Indians are there, do you have any trouble about their wanting to keep certain places?

A. Yes; we have never put one of them off a place after he was there.

Q. Do you hold your land as high as Seufert?

A. No; I and my brother would convey all our rights upon more reasonable terms.

Examination closed.

Testimony taken at Portland, Oregon, May 24th, 1897, on behalf of defendants.

All parties being present as heretofore.

HOLLISTER D. MCGUIRE, a witness sworn on behalf of defendants, testified as follows:

Direct examination by Mr. MAYS:

Q. State your name, age, and residence.

A. Hollister D. McGuire; age, 43; residence, Portland, Oregon.

Q. What is your occupation?

A. State fish and game protector for the State of Oregon.

355 Q. How long have you held your present office?

A. Some where near four and a half years.

Q. You may state whether or not in the course of the discharge of your duties you have had occasion to investigate the general character and habits of the fish in the Columbia River?

A. I have, some.

Q. Did you, to any extent, prior to your term of office?

A. Some what?

Q. Are you required to make annual or semiannual reports to the governor of the State?

A. I am; annual report.

Q. With reference to your office?

A. Yes, sir.

Q. In connection with your office you may state what is the result of your investigation concerning the habits of the salmon in the Columbia River, with reference to whether or not they returned down the river to the ocean after spawning. Just go ahead and tell what the habits of the salmon in the particulars above mentioned are?

A. All the salmon of the Columbia River that ascend to what is called the head water or any distance, one hundred or one hundred and fifty miles above the sea, die after spawning.

Q. Have you investigated that question pretty thoroughly, and to your satisfaction?

A. I have.

Q. Have you reported in any of the reports the information you have obtained on that subject?

A. I have referred to it.

Q. Have you had occasion during your incumbency in office to consider this question with persons whose duties were some thing of the nature of yours?

A. Yes, sir.

Q. With whom?

356 A. Principally with Mr. Hubbard, the superintendent of the United States fish cultural station on the Clackamas River.

Q. You may state what was the result or his conclusions in that respect.

A. We have had a great deal of talk on the subject. Formerly I did not have much faith in the theory which has obtained for a great many years among the parties who have studied the question, such as Prof. Gilbert and Dr. Jordan, and I have modified my early views; we visited the hatchery station; they have a rack in the river to hold the salmon; the salmon come up to it and they hold them until they get ripe for spawning purposes. Mr. Hubbard told me no salmon which pass through this rack ever come back alive, but always floated down dead. In fifteen years he has never seen a live chinook salmon come down alive, except steel salmon.

Q. Where is this hatchery?

A. Six miles above the mouth of the Clackamas River, at or about seventeen miles from Portland.

Q. What is the distance from Portland to the mouth of the Columbia River?

A. A hundred and ten or a hundred and twelve miles.

Q. So the entire distance from the hatchery to the mouth of the Columbia River would have exceeded a hundred and thirty miles?

A A hundred and twenty-five or thirty.

Q. What kind of a hatchery is this?

A. Government hatchery, for the purpose of propagating artificially the salmon.

Q. What is the fact, Mr. McGuire, if you know, as to whether or not the wheels in the Columbia River take all the salmon?

A. They certainly don't take all of the salmon.

Q. State what proportion, if you know, of the entire catch of the Columbia River was by wheels?

A. 1895, the wheels took five per cent of the entire catch of salmon that was packed and shipped.

Q. You may state whether or not that would be pretty nearly correct?

A. Yes, sir; substantially so.

357 Q. What various plans do they use on the Columbia—below the Cascade locks, for instance?

A. Various modes for fishing. There is the gill net and sein's, pound nets, and set nets.

Q. Any wheels?

A. No wheels below the Cascade, in the vicinity of the Cascade.

Q. Do you know about how many wheels are on the Columbia River?

A. It is reported in my report, I think. Thirty-eight scow wheels and stationary wheels.

Q. You may state whether or not any of them in the vicinity of the Cascade locks have what they call leads.

A. Yes, sir. The lead is a sort of a dam that is built off diagonally into the stream a certain distance, more or less, to direct the salmon into the wheel.

Q. You may state, if you know through correspondence or personal conversation, what are the opinions of Dr. Jordan and Professor Gilbert as to whether they return to the ocean after spawning.

A. They both claim that the salmon—that any salmon that ascends to the headwaters, or a distance of one hundred miles from the mouth of the river, die after spawning; that a small per cent near the mouth of the river return.

Q. Who are these gentlemen?

A. Doctor David Starr Jordan, president of the Leland Stanford University of California, and Professor Gilbert, of the same institution, are recognized as the leading authority upon the fish of the Pacific coast; especially regarding salmon and trout.

Q. Is there any difference of opinion amongst experts in this respect on that question?

A. None that I know of.

Q. Have you their report—that is, the report of Dr. Jordan and Professor Everman?

A. I have the report of Dr. Jordan and Professor Everman, Ichthyologist of the United States Fish Commission.

358 Q. What is this book called?

A. That is the report upon the fish of North and Central America.

Q. What bulletin is this?

A. That is the bulletin issued by the National Museum, number 44, issued in numbers.

Q. On what page is that subject treated?

A. Page 476 and other pages.

Cross-examination by Mr. ROBERTSON:

Q. Have you ever had an occasion to examine the rivers, or to attempt yourself to stop any of these dead fish going down after spawning?

A. Yes, sir. I have visited the Clackamas River to study the question, and have watched the fish go down. I seen steelheads going back alive; the chinook salmon that came back were dead.

Q. Do you know Dr. Gilbert?

A. Yes, sir.

Q. He was sent here in '94 to make investigation?

A. He was.

Q. Have you his report?

A. I have not, made at that time.

Q. In your report of '95 and '96, I will ask you if you didn't publish an article from Dr. Jordan?

A. Yes, sir.

Q. And if in that article he didn't state the question was still in doubt, and that Dr. Gilbert had been sent to the Columbia for the purpose of definitely ascertaining?

A. Yes, sir. That was really written a great many years ago; several years ago, at least. This, I think, was a revision of a former article. I think this was written in '84, the revision of the former article.

Q. Now the spawning season, however, is not the fishing season?

A. Well, it should not be, but they do fish during the spawning season.

359 Q. You have recommended that laws be enacted and strictly enforced that prohibit the taking of salmon during the spawning season?

A. I have; yes, sir.

Q. What becomes of those salmon that go up the river in the spring, March, April, May, and June?

A. Those are the ones that get past this rack. I will explain this rack can't be used to any advantage until July and August.

Q. I am talking about the Columbia; what becomes of the salmon that ascend the Columbia in March, April, May, and June?

A. My belief is that all those salmon that go to the headwaters of any of our streams perish.

Q. Is it not a fact that salmon can not go to the headwaters of the Columbia?

A. They can only go as far as the obstruction in the upper Columbia.

Q. Where is that?

A. Salmon Falls is, I think, as far as they can go. Salmon Falls, I think, according to the examination recently made by Mr. Everman, who was sent out by the United States Fish Commission, in his article which I have states that Salmon Falls is as far as they can go.

Q. Salmon Falls is quite a long ways?

A. It is two hundred or a hundred and fifty miles above Salido.

Q. What is the depth of the water and width of the river at Salmon Falls?

A. I could not say, sir.

Q. Can you state approximately?

A. No, sir; I could not.

Q. I will ask you if this is not the theory, that these salmon in ascending the river to spawn travel up towards the head waters and bruise themselves on the rocks and stones, and are thereby rendered incapable of swimming downstream, and the parasites and other diseases does not attack them in that condition, and that is the reason they die?

A. That is given as a reason; also that they don't seem to eat after they enter fresh water, after making a long travel are weakened by parasites, etc., all of which have a tendency to result in their death.

360 Q. Suppose this case, that salmon should ascend a river, say forty or fifty miles, and they had such a depth of water they would not necessarily become bruised and there meet an obstruction, would you say under such conditions that these salmon would necessarily die?

A. No, sir; I would not. I think there is an uncertain and unknown percentage of salmon that are delayed, for some cause unknown, in entering the stream to spawn. They are so delayed they have but time to just enter the river, and until they are overtaken they drop their spawn and return to the ocean. What that percentage is no one knows.

Q. What percentage of the catch of the salmon is taken within twenty miles from the mouth of the Columbia—say fifty miles of the mouth of the Columbia?

A. Well, fifty miles, I should say eighty per cent at least, may be ninety, vary somewhat according to the stage of the water which effects the run somewhat. A large percentage may be eighty or ninety per cent.

Q. There is no fish wheels at the mouth of the river?

A. No, sir.

Q. Then while it is true that only five per cent of the fish have been caught in the fish wheels, it is also true that more than one-half per cent, approximately one-half per cent, of the fish caught in the upper part of the river were caught with fish wheels—that is, I mean one-half of the fish are caught with fish wheels?

A. I think so; probably more.

Q. In fact, when you go up to The Dalles, Seufert's, Winans', and the Salido fishery, practically all of the fish are caught with fish wheels, are they not?

A. A large percentage; some sein's, some gill nets; but a large percentage of the fish are taken with the wheels.

Q. At the point in the Columbia where these fish wheels are stationed, are you familiar with the depth and width of the river at the various stages of water?

A. I have seen it at various stages.

361 Q. I will ask you if these fish wheels are not so stationed as to be at a point where the salmon would naturally pass.

A. I presume the fish wheels are placed where they are compelled by the nature of the stream to place them. They couldn't place them except on the shore. Can only place it to advantage in swift water. It has got to be placed on the shore. It is impossible to place them in the middle of the stream.

Q. Scow wheels are?

A. Yes; a few places may be.

Q. Have you ever made an investigation to determine just the number of fish caught with each fish wheel or by each fish wheel during the fishing season?

A. It is a very uncertain thing. One wheel this year might be a very successful wheel, might take lots of fish, while next year might be an entire failure—not take any fish at all. It is hard to account for, but it is a fact.

Q. Is the failure of salmon to eat due to his inhabitation of fresh water or to his condition with reference to his spawning?

A. I only have a theory. My theory is their lack of *of* supply of sardines and small fish they live on in the ocean, which they don't have in the rivers. It is known that fish taken out at The Dalles have no food in their stomach.

Q. Are these fish taken out at The Dalles in good condition?

A. Well, I don't know. I couldn't say as to that. It is my opinion that some fish are taken in the fall that are pretty well advanced towards spawning; too much so.

Q. Do you think that the fish wheels are generally to be commended as a proper method of taking fish in order to preserve the game fishes of the river?

A. I don't know why they are any more detrimental to the salmon industry than any other apparatus that would take a like number of fish.

Q. The gill net takes fish only at a certain size?

A. Yes, sir.

362 Q. What size?

A. Of course that depends upon the size of the mesh. There are fish taken by the mesh at Astoria that weigh twelve or fifteen pounds.

Q. How about the mesh in the fish wheels with reference to the size of the fish?

A. They take most anything that runs from two pounds up.

Q. What is the proportion of small fish taken by the fish wheels?

A. It varies, of course. The blue back runs from two to eight pounds.

Q. What is the blue back?

A. Small salmon. It is called the red fish by most of the scientific writers.

Q. Does that spawn the same as salmon?

A. Yes, sir.

Q. Does it also die?

A. Yes, sir.

Q. The steel head doesn't die?

A. No; we see them going back. Catch them going down to the sea at Astoria.

Q. Are you acquainted with Mr. Thompson?

A. Only by reputation.

Q. What position did he occupy?

A. He was one of the board of fish commissioners of this State.

Q. I will ask you if he has made any investigation himself, if you know, with reference to the theory that is advanced by these other scientists you speak of.

A. I have not read anything he has penned.

Q. Mr. Whealdon, who resides at The Dalles, said that Mr. Thompson informed him that he had not only thought of the theory but had made a practical demonstration; that he had, after the salmon had spawned, cut a U out of the back fin, and also marked the small fry; that these fish marked returned to the same river the next year and some the year after; that the small fish returned the third or fourth year. Now, in the face of that actual demonstration, would that effect your theoretical ideas or not?

363 A. I have put about the same thing into practice. I have had some five thousand or over marked by cutting off the adipoes fin—that is a small fin close to the tail in the back. Those fish we have not heard from yet. It will be next year before we can expect to have them return. As I understand, the only person that has claimed to do that is Robert Head, of San Francisco. He claims he did so mark fish, and that he marked the late spawning female and turned her out, and they

were afterwards caught. I don't think this disproves the other argument that these fish, after going to the headwaters, die, for his hatchery was close to the ocean.

Q. These fish that are caught at The Dalles are found battling against the severest current met so far in the Columbia?

A. Yes; I presume it is as swift there as at the Cascades.

Q. Up at Salido many of them stop below the falls there, don't they?

A. I think there are more or less stopped all along the river, wherever they are overtaken.

Q. So, then, your theory would simply apply to those fish that have gone so far up the stream they are overtaken by disease or want of strength and float down dead?

A. There may be fish that spawn above The Dalles and subsequently reach the ocean, but I don't think so.

Q. Mr. Whealdon also testified that in a number of instances he had observed the marks of nets on fish, showing they had been caught in the nets a number of years before, thereby indicating they had been caught in nets before and got back to the ocean. What would you say with reference to that?

A. It is barely possible; I never seen such fish.

Q. Did you ever see fish spawning running downstream?

A. Yes; have watched them spawning, making their egg, and saw the female covering it up with her tail. They usually go there, and when they get through spawning, float tail foremost downstream, or lay around and later turn over on their back and float back again, evidently struggling with a death struggle.

Q. You have seen them return, have you not?

A. Never. The superintendent of the hatchery he has had
364 twenty-two years' experience, and he is so thoroughly convinced of it that he kills every fish taken out of the trap after spawning. I asked him why he didn't throw them back, and he said they would die anyway, and he kills every fish before he throws it back in the stream.

Q. A man may be convinced of a theory, yet it might be wrong?

A. No man can positively say fish didn't go back, except so far as I have examined it and the authorities I have given.

Q. Are you familiar with the fisheries at The Dalles?

A. Yes; somewhat.

Q. I will ask you if that is considered an important fishery?

A. Yes; the most important towards the headwaters of the river.

Q. Do you know who are the principal fishers at that point?

A. Mr. Seuferts and Mr. Winans and Taft and Messrs. Everding & Ferrell.

Q. The whole of the Washington shore is known as Winans fishery?

A. I think they control that.

Redirect examination by Mr. MAYS:

Q. You don't know that is so?

A. No; only hearsay.

Q. Has not Mr. Seufert two wheels and his nets on the Washington side?

A. I believe he has. I think Mr. Seufert has some interest over there.

Q. Down below Winans there are some other wheels, are they not?
A. The fact of it is, I don't know.
Q. Are there any scow wheels except those that are attached to the shore?
A. Quite a number of scow wheels; yes, sir.
Q. Are there any scow wheels out in the middle of the river?
A. I never saw them in the middle of the river; no.
Q. It is impractical to keep a scow wheel out in that swift water during the fishing season?
A. Yes. I will state, however, I have a letter from Dr. Jordan, one from Mr. Gilbert, and one from Mr. Hubbard on this subject.
Q. They agree with you?
365 Q. They agree with you?
A. Yes, sir.
Q. What is Mr. Hubbard's official position?
A. Superintendent United States fish culture in Oregon.
Mr. MAYS. That is all.
Mr. ROBERTSON. That is all.
Examination closed.

LEWIS T. BARIN, a witness called on behalf of defendant, being duly sworn, testified as follows:

Q. What is your age?
A. 55.
Q. Residence?
A. Portland, Oregon.
Q. Occupation?
A. Attorney at law.
Q. What, if any, official position have you held in the State, Mr. Barin?
A. I have been several times a member of both houses of representatives and senate, register of land office at Oregon City, nine years United States marshal; before that, elected several times city attorney, mayor, etc.; held a great many positions.
Q. I will ask you to state whether or not you are acquainted with the habits of the fish, and if you at any time made a study of the question; and if so, under what circumstances and what were the results of your investigations?
A. If you mean the habits of fish generally I can not answer the question. If you mean salmon I can answer.
Q. You may state.
A. I have made a study of the Columbia River salmon for thirty years, and I think I understand it pretty well.
Q. I will ask you if in the course of any of your official positions you have had occasion to write a report upon that subject?
366 A. During the session of the legislature of 1887, I think it was, I was appointed chairman of the committee to investigate the best interests of the fish industry of this State, that is, to investigate it during the recess of the two sessions of the legislature; I was a hold-over senator and to investigate any different modes and make a report, with the object of drawing up a fish law that would regulate fishing in this State.

I made that investigation in accordance with the instructions of the legislature.

Q. What was the particular point that was desired to be investigated, and interest to be protected?

A. They wanted me to investigate the whole business and see what mode of fishing should be devised, and remedies to keep from the destruction of the fish. In my report I reported upon the whole subject, the mode of fishing, the time fish ascend the river, their time of spawning, their death, etc., and all my experience, and also that of the committee. I desire to say here that Mr. Thompson you (Mr. Robertson) referred to was along with us. I might say right here that in my report I mentioned that the salmon after they ascended the Columbia River, except those that are forced to spawn by coming up late, that all those that ascend after spawning, die. I gave my reasons in that report why.

Q. What is the generally accepted theory of scientific people upon that question as to their agreeing with you, or not.

A. At the beginning both Dr. Jordan and Professor Gilbert differed with me, especially with regard to the little salmon. In that report I stated that the small salmon that ascend the river with the larger ones dies the same as they did; that whenever one ascended the river, they ascended for spawning purposes, and no matter how small or how large they died after they got through with that operation. Dr. Jordan and professor Gilbert differed in regard to the small fish. They also doubted the salmon dying; since then I have got several letters from Gilbert, and I have seen reports from Dr. Jordan, in which they admit I am correct.

Professor Gilbert says so to me in his letter, and Professor Gilbert
367 in his report says that he had to modify his views and admits that salmon do die.

Q. What is the fact as to whether the wheels catch all the salmon?

A. No, I don't know much about the wheel business. I have seen them, but who catches most of the fish I don't know. I know a good many of the wheels catch a great many fish.

Q. What is the fact as to whether salmon are taken by nets both above and below?

A. I know they are fishing for salmon during the run above and below the Cascades.

Q. I mean above and below where the wheel fishing is. For instance, a wheel is located at a given point, whether or not a short distance above or a short distance below net fishing may be successfully carried on?

A. I know this, they do fish above and below the wheel; some has set nets and some seines, and fish in different ways. When I was there with the committee they were fishing with dip nets at Salido.

Q. What is the conduct of fish upon entering the mouth of the Columbia, if you know, as to their traveling, and where they travel? I call your attention to page 476 of the United States Bulletin No. 47, referred to in Mr. McGuires' testimony where it says, when first entering the stream they swim about as if playing; afterwards they swim straight up at about two miles per day. Those that enter the Columbia in the spring and ascend the mountain rivers, ascend more rapidly. What was the result of your investigation with reference to that subject-matter?

A. I think some travel faster and some slower; they sometimes rest in pools. I know on the 3rd of July, '94, some of the men got salmon

up on the river, on the 3rd day of July in Idaho. The salmon looked fresh.

Q. What is the fact in regard to salmon as to their entering the deepest part of the stream and swimming straight up against the current?

A. I believe that this is true; they will enter the deepest part of the stream and go up the current. They always travel the current
368 any time except when they lie still; they never go into dead water but gradual slow current, and there congregate and lie there until they can ascend, and when they enter a spawning river they lie there until they are ready for spawning, in the pools, and they go up when they are ready for spawning to the gravel bars.

Cross-examination by Mr. ROBERTSON:

Q. I will ask you if it is not a fact that nearly all the fish caught above the Cascades are caught with fish wheels?

A. I suppose a large majority. They fish there with gill nets and set nets.

Q. Not to any appreciable extent do they fish with appliances other than fish wheels at The Dalles?

A. You mean above The Dalles?

Q. Yes; rapids and The Dalles.

A. I believe most of the fish there are caught with the fish nets. I will say, though—you asked the question about the condition of the fish—the fish there are in good condition. I was there on the 7th day of July when I made that investigation, and I found good fish there; they were not in as good condition as coming out of the ocean, but were in perfect prime condition.

Q. If they spawned a few miles above there would they go back to the ocean?

A. They don't one of them go back to the ocean. It is not the nature of the chinook salmon to go. I have seen them spawn at the hatchery when they were in pretty good condition. I have been at the hatchery. I was attorney for that company; employed there for years, and went back and forwards.

Q. What hatchery?

A. Oregon and Washington Fish Packing Company that was built in '77.

Q. Where located?

369 A. On the Clackamas River, now owned by the Government.

Q. Are you the attorney for any cannerymen?

A. Not at all.

Q. Have you any interest in any fish industries?

A. No; not at all.

Q. What were your duties as attorney for this company?

A. At that time when the company finally concluded to build a hatchery on the Clackamas, Mr. Stone and others, when they wanted a little business done, would come to me; I was regularly employed and would do their business.

Q. There have been several bills introduced in the Oregon legislature to permit the use of fish wheels?

A. Yes, sir.

Q. Any become a law?

A. No.

Q. At any time?

A. No time. I wish to finish what I started to say. I have seen salmon at that hatchery in good condition, marked and turned loose, go up the river, and would still keep going after the spawn had been taken out of them.

Q. The theory Mr. McGuire advanced, that as soon as they spawned they turned over and died, was not borne out by your investigation?

A. The salmon after he has first spawned, when you throw him in, he will drop on his back; if he is a good stout salmon, he may recover and swim around and will keep going upstream.

Q. Your theory, then, does not bear out his idea that some spawn near the river and turn round?

A. They are so light where they spawn in brackish water right near the ocean the tide or currents will wash them back. When they strike salt water they will recover.

370 Q. These salmon must have pretty well recovered if you found them up the river after they had spawned?

A. Some ten days afterwards I saw them up the river two or three miles.

Q. If you only found them up the river two or three miles, you don't think they occupied all that time going up?

A. Gradually found their way up.

Q. Gradually got away?

A. Yes, sir.

Q. What is to prevent them swimming downstream, because they don't?

A. Let me tell you. Down here when that rack was first put in in 1887, the rack on the Clackamas, it was put in in June to stop the salmon that were going up to spawn. When it was put in I was not there; I had men to watch it until away after spawning time in the fall. I went there two or three times a week to examine and see what the progress was. I never saw a live salmon come back from that time until two months after spawning time.

Q. Then a few came back?

A. Not one.

Q. Chinook are the only kind that die?

A. The Chinook and silver salmon and blue back die.

Q. What are the other kind that don't die?

A. Steel head; it is not a salmon; it is a sea trout, at that same rack; the same year that the rack was built in June; the steel heads hadn't got through spawning; they came back and lay there above the rack by hundreds and lay there for months, and after the winter freshets in December they let them out and they went down to salt water.

Q. Steel heads flourished when they were there in fresh water for months?

A. Yes, you could see them just as plain as you can see those dots on the cardboard. If the Chinook salmon had come down you could have seen them, too.

371 Q. These Chinook salmon, don't they eat steel heads or sea trout?

A. Yes, sir.

Q. Don't they live on the same character of food salmon do?

A. I suppose they do; they eat in fresh water, some.

Q. The fact is, Chinook salmon will eat in fresh water, some?

A. I have caught them with hook and line.

Q. What kind of bait?

A. Trolling spoon and salmon eggs. They are a peculiar fish and will not eat only in smooth water; they will never bite when running.

Redirect examination by Mr. MAYS:

Q. Did you do much trout fishing?

A. Yes; a good deal.

Q. When you acted as attorney in the capacity you mentioned, were you regularly employed or not?

A. No; they just occasionally came to me for me to make a deed or transfer; something of that kind.

Q. You were living at that time at Oregon City?

A. Yes, sir.

Q. Have you any interest of any kind in any fishing business, canneries—anything of that character?

A. I never did have. The only reason why I investigated the salmon was I have always been fond of fishing, and in the early days, before I knew anything about it, I thought nothing would do for bait except salmon eggs.

Q. You continued that investigation from time to time until the times when you were acting on behalf of the State?

A. Yes, sir.

Mr. MAYS. That is all.

Mr. ROBERTSON. That is all.

Examination closed.

372 It is hereby stipulated that the plaintiffs may file with the examiner as if offered in evidence at this time, providing that such evidence exists, a protest and application to purchase filed on behalf of the Government or Indians with the Commissioner of Public Lands of Washington, protesting against the disposition of the shore land in front of the tracts of lands described in the bill of complaint and answer, and the letter of said Commissioner of Public Lands to William H. Brinker, United States attorney, together with evidence showing that the protest was brought to the attention of the purchaser of the said tide lands, and further the judgment in the case of the United States and the Yakima nation of Indians v. Frank P. Taylor, and the opinion of the Supreme Court thereon by citation, reported in 3 Washington Territory, at page 88.

The defendants' attorney, by this stipulation, does not admit the existence of all or any of such papers, records, or decision, and expressly reserves all rights given him under the general stipulation in regard to objecting to testimony.

It is hereby stipulated and agreed that the lands in controversy are

now owned by Tyler Woodward, of Portland, Oregon, by mesne conveyances from persons who received patents of which copies are hereunto annexed from the Government; that said lands are now in the possession of the defendants, Winans Brothers, and held by them under a bond for a deed, for the purchase thereof from said Tyler Woodward;

That lot 5 in section 19, and lots 1, 2, 3, 4, and 5, section 30, township 2 north, of range 14 east, was on the —— day of ————, 189 ;

It is hereby stipulated that the records of Klickitat County, Washington, show that on the 9th day of January, 1893, the patent mentioned in the evidence of J. J. O'Keane, from the United States, to William P. Murphy, for lots 4 and 5, section 30, township 2 north, of range
373 14 east, was filed for record in the office of the auditor and duly recorded; that the same day the patent referred to in the testimony of J. J. O'Keane, from the United States to Wm. Taylor, for lots 5, section 19, and lots 1, 2, and 3, section 30, township 2 north, of range 14 east, was recorded in said auditor's office; that on August 27th, 1891, Wm. P. Murphy and Sarah B. Murphy deeded to Frank P. Taylor lots 4 and 5, section 30, township 2 north, of range 14 east, and the same was duly recorded in the office of the auditor of said county; that on the 19th day of June, 1883, George W. Roland and wife quitclaimed to Frank P. Murphy lots 2, 3, 4, and 5, section 19, and lots 1, 2, and 3, section 30, township 2 north, of range 14 east; that said deed was regularly and duly recorded July 31st, 1886, and on the same date William Hughes and wife by quitclaimed deed, deeded their interest in said land to Frank P. Taylor, which said deed was duly recorded on the 31st day of July, 1886;

And on the 15th day of September, 1883, Elsie L. Murphy deeded to Frank P. Taylor by quitclaim deed lot 5, section 19, and lots 1, 2, and 3, section 30, township 2 north, of range 14 east, which said deed was duly recorded on the 31st day of July, 1886; and Marion N. Salisbury and wife, May 17th, 1884, quitclaimed to Frank P. Murphy lot 5, section 19, and lots 1, 2, and 3, section 30, said township and range, which said deed was duly recorded July 31st, 1886;

That John P. Taylor, September 13th, 1884, quitclaimed to Frank P. Taylor lots 5, section 19, and lots 1, 2, and 3, section 30, same township and range, deed duly recorded July 31st, 1886; that on September 14th, 1886, the probate court distributed the land patented to William Taylor to Frank P. Taylor, C. A. Roland, and the other grantees above named, and duly distributed the same to Frank P. Taylor, their grantee;

That on August 3rd, 1886, by warranty deed, Frank P. Taylor and wife conveyed to Donald Ross and O. D. Taylor lot 5 in section
374 19, and lots 1, 2, 3, 4, and 5, section 30, said township and range, deed recorded June 10th, 1887;

That on October 4, 1889, Donald Ross and wife by warranty deed conveyed to O. D. Taylor lot 5, section 19, and lots 1, 2, 3, 4, and 5, section 30, said township and range, deed being for an undivided one-half thereof;

That on June 20, 1890, O. D. Taylor and wife deeded a right of way through said described land to the Farmers' Transportation Company for a railroad and telegraph line.

The records of Klickitat County, Washington, show with reference to the title to lots 4 and 5, section 30, township 2 north, of range 14 east, as follows:

That Donald Ross and wife, on October 4th, 1889, by warranty deed conveyed to O. D. Taylor an undivided one-half in lot 5, section 19, and lots 1, 2, 3, 4, and 5, section 30, township 2 north, of range 14 east;

That said records further show that on January 10th, 1893, O. D. Taylor and wife conveyed by warranty deed to Tyler Woodward lot 5, section 19, and lots 1, 2, 3, 4, and 5, section 30, township 2 north, of range 14 east, lying between the right of way of the Columbia Railway & Navigation Company and the water mark of the Columbia River on its western side. On that date he deeded all of the lots lying between the railroad and the Columbia River, together with the fishing privileges of lot 1, section 25, township 2 north, of range thirteen east W. M., lying between the northern part of lot 5, section thirty, township 2 north, of range 14 east Willamette meridian, and the northeast point of the bay known as the Big Eddy, with the right of ingress and egress thereto. Recorded January 12, 1893;

That January 12th, 1893, Tyler Woodward and wife executed a bond for a deed to the defendant Winans, with the following description:

All that part of lot 5, section 19, and lots 1, 2, 3, 4, and 5, section 30, township 2 north, of range 14 east W. M., lying between the
375 Columbia Railway and Navigation Company's right of way and the water mark of the Columbia River on its western side, together with the fishing privileges of lot 5, section 25, township 2 north, of range 13 east W. M., lying between the southern point of lot five, section 30 north, range 14 east, and the northeast point of the bay known as the Big Eddy, with the right of ingress and egress thereto, instrument being recorded January 12th, 1893.

It is hereby stipulated that the rights of said Winans' under said bonds for the purchase of said land are still in force and ever since the date of said bonds, and now the said Winans are holding the said premises thereunder and have been and still are making payments thereon.

It is agreed and stipulated that the contract introduced in evidence for part of the shore land in controversy contains the same general terms and conditions of the contracts from the State for the sale of the shore lands, all of which contracts of sale run to Sylvester Ferrell, and the defendants have acquired the interest of the said Ferrell therein, and that said defendants have such contract of purchase and now are occupying the same, and the said contracts have been purchased and executed since this suit was begun; that said contracts call for all the shore lands lying between the patented lands described in the complaint and the answer, and the low-water mark of the Columbia River, and that said contract of sale was executed under the laws of Washington for the sale of its shore lands.

376 PLAINTIFFS EX. "B."

Received at Vancouver, W. T., 9.30 June 12th, 1888.
Dated Washington, D. C., June 12th, 1888.

To REGISTER AND RECEIVER,
Vancouver, W. T.

Refuse all applications by white men to enter land in township 2, ranges 13, 14, and 15 east. Further instructions by mail.

T. J. ANDERSON, *Actg. Commr.*

U. S. LAND OFFICE, VANCOUVER, WASH., *May 22, 1897.*

I hereby certify that the foregoing is a correct copy of a telegram remaining on file in this office.

B. F. SHAW, *Register.*

377 PLFFS. EX. "C."

(Copy.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., May 24, 1888.

The honorable
The SECRETARY OF THE INTERIOR.

SIR: I have the honor to invite your attention to the enclosed copy of a letter from Special Indian Agent Geo. W. Gordon, dated May 7, 1888, urging that the register and receiver at Vancouver, Washington Territory, be immediately instructed to allow no entries or filings on any lands embracing fisheries where Indians are now taking fish, or where they have been accustomed to take fish, on the north side of the Columbia River, in Tps. 2 N., R. 13, 14, and 15 east, in Klickitat County, said Territory.

He states that he has received information that white men are about to make homestead entries along the river in order to appropriate these fisheries to themselves; that the lands are valueless for anything else, and that if the whites get possession of the lands the Indians will be deprived of their fishery rights, guaranteed to them by the treaty of 1855 (Stat. 12, p. 951).

The special agent intends to visit the fisheries in question as soon as the pressing duties upon which he is now engaged will permit, when he will ascertain and report as to the particular sections embracing the fisheries. In the meantime he wishes to prevent the whites from entering the lands, and he suggests that any one attempting to make entry in any of said townships shall be required to make oath that the tracts they seek
378 to enter do not embrace any fisheries or fishing sites or privileges, and that if they do embrace such fisheries, sites, or privileges that their applications be rejected.

The great difficulty we have experienced heretofore in protecting the Indians in their vested rights in the fisheries on the north side of the Columbia, has grown out of the fact that the Government has allowed

the whites to enter and obtain title to lands embracing some of the fisheries in which the Indians had and still have vested rights, as the courts have recently decided. As soon as the whites had obtained title they have turned around and denied the Indians access to the fisheries. All these things are too well known to the Department to require recital.

To the end that no further injustice may be inflicted upon the Indians I have the honor to recommend that the General Land Office be instructed to speedily direct the register and receiver at Vancouver, W. T., to peremptorily refuse to allow all entries attempted to be made by white men upon any lands in said townships embracing fishing sites or privileges that are now used by Indians, or to which they are accustomed to resort to obtain fish, until further orders from the Department.

Very respectfully, your obedient servant,

A. B. UPSHAW,
Acting Commissioner.

(Larrabee.)

U. S. LAND OFFICE, VANCOUVER, WASH.,
May 22, 1897.

I hereby certify that the within and foregoing is a true copy of a letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, remaining on file in this office.

B. F. SHAW, *Register.*

379 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 25, 1888.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I transmit herewith copy of communication of 24th instant from the Commissioner of Indian Affairs, and enclose therein noted, relative to the fishing privileges of Indians in the Columbia River guaranteed to them by the treaty of 1885 (12 Stat., 951), and recommending that instructions be issued directing the land officers at Vancouver, W. T., to refuse all entries attempted to be made by white men in townships 2 N., ranges 13, 14, and 15 east, in Klickitat County, Washington Territory, until further orders from the Department.

Concurring in the recommendation of the Commissioner, you are hereby directed to communicate the necessary instructions on the subject to the proper land officers, by telegraph and by mail.

Very respectfully,

WM. F. VILAS, *Secretary.*
H. L. M.

247 Ind. Div., '88.
Two enclosures.

U. S. LAND OFFICE, VANCOUVER, WASH.,
May 22, 1897.

I hereby certify that the foregoing is a true copy of a letter from the Secretary of the Interior to the Commissioner of the General Land Office as the same remains on file in this office.

B. F. SHAW, *Register.*

380 Refer in reply to this initial C.

1888 63013.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1888.

REGISTER AND RECEIVER,
Vancouver, W. Ty.

GENTLEMEN: I enclose herewith a copy of a letter dated May 24, 1888, addressed by the Acting Commissioner of Indian Affairs to the Hon. Secretary of the Interior, relative to attempts by white men to deprive the Indians of their vested rights to take fish in the Columbia River guaranteed to them by the treaty of 1855 (12 Stats., 951); also a copy of the Secretary's letter of May 25, 1888, in which he directs that all entries attempted to be made by white men in township 2 N., ranges 13, 14, and 15 E., be refused until further orders from the Department.

You will accordingly refuse to receive any and all applications to file on or enter lands in the townships above named which may be presented by white men, as directed by the Hon. Secretary.

Very respectfully,

T. J. ANDERSON,
Acting Commissioner.

U. S. LAND OFFICE, VANCOUVER, WASH.,
May 22, 1897.

I hereby certify that the foregoing is a true copy of a letter from the General Land Office remaining on file in this office.

B. F. SHAW, *Register.*

381 The United States of America, to all to whom these presents shall come, greeting:

Certificate No. 2542.

Whereas Orson D. Taylor, of Wasco County, Oregon, has deposited in the General Land Office of the United States a certificate of the register of the land office at Vancouver, Washington Territory, whereby it appears that full payment has been made by the said Orson D. Taylor, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for lots one, two, and three and the northeast quarter of the southwest quarter of section twenty-five in township two north of range thirteen east of the Willamette meridian, in Washington Territory, containing one hundred and sixty-four acres and seventy-five hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor-General, which said tract has been purchased by the said Orson D. Taylor:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents

do give and grant, unto the said Orson D. Taylor, and to his heirs, the said tract above described;

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Orson D. Taylor, and to his heirs and assigns for-
382 ever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

By the President:

BENJAMIN HARRISON,
By (Signed) M. McKEAN, *Secretary.*

[Seal of the United States General Land Office.]

(Signed) D. TYLER,
Recorder of the General Land Office ad interim.

Recorded, Vol. 5, page 337.
Examined.

383 The United States of America to all to whom these presents shall come, greeting:

Certificate No. 357.

Whereas William P. Murphy, of Polk County, Oregon, has deposited in the General Land Office of the United States a certificate of the register of the land office at Vancouver, whereby it appears that full payment has been made by the said William P. Murphy, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the lot numbered one of section seventeen, the lot numbered two of section nineteen, and the lots numbered four and five, of section thirty, in township two north, of range fourteen east, in the district of lands subject to sale at Vancouver, Washington Territory, containing seventy acres and fifty-hundredths of an acre, according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor-general, which said tracts have been purchased by the said William P. Murphy;

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents, do give and grant, unto the said William P. Murphy, and to his heirs, the said tracts above described; to have and to hold the same, together

with all the right, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said William P. Murphy, and to his heirs and assigns forever.

384 In testimony whereof, I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the second day of July, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States the ninetieth.

By the President:

(Signed) ANDREW JOHNSON,

By (Signed) EDW. D. NEILL,
Sec'y.

[Seal of the United States General Land Office.] (Signed) I. N. GRANGER,
Recorder of the General Land Office.

Recorded, Vol. 1, page 305. Examined.

385 The United States of America to all to whom these presents shall come, Greeting:

Examined.

Certificate No. 1020.

Whereas William Taylor, of Clickatat County, Washington Territory, has deposited in the General Land Office of the United States a certificate of the register of the land office at Vancouver, whereby it appears that full payment has been made by the said William Taylor, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for the lot numbered five of section nineteen, and the lots numbered one, two, and three, of section thirty, in township two north, of range fourteen east, in the district of *of* lands subject to sale at Vancouver, Washington Territory, containing ninety-nine acres, according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor-general, which said tract has been purchased by the said William Taylor;

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William Taylor and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said William Taylor, and to his heirs and assigns forever.

386 In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

387 This agreement made in duplicate this 9th day of June, 1896, by and between the State of Washington, party of the first part, and S. Farrell, of Portland, Multnomah County, Oregon, of the second part, pursuant to an act of the legislature of said State, entitled "An act to provide for the selection, survey, management, lease, and disposition of the State's granted, tide, oyster, and other lands, harbor areas, and for

[Conclusion of original folio 366.]

Given under my hand, at the city of Washington, the twentieth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States the ninety-fourth.

By the President:

U. S. GRANT (signed),
By I. V. BENNITT (signed),
Sec'y.

[Seal of the General Land Office.]

I. N. GRANGER (signed),
Recorder of the General Land Office.

Recorded, Vol. 2, page 364.

the conformation and completion of the several grants to the State by the United States, creating a board of State land commissioners, defining their duties and authorizing them to act as the commission provided for in article 15 of the State constitution, and declaring an emergency," approved March 26, 1895,

Witnesseth that the party of the first part, in consideration of the sum of seven hundred thirteen and $\frac{85}{100}$ (713.85) dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements, and conditions hereinafter expressed, on the part of the party of the second part to be performed and kept, hereby agrees to sell to the party of the second part the certain tracts or parcels of shore land land of the second class situated in Klickitat County and State of Washington, described as follows, to wit: All shore land of the second class owned by the State of Washington, embraced within the following-described boundaries, to wit: Beginning at a point on the line between lots 4 and 5, sec. 19, twp. 2 N., R. 14 east, W. M., from which the meander corner to fractional sections 19 and 20, same twp. and range bears N. 27 deg. 32′ E., 53.09 chains; thence east 4.42 chains S. 54 deg. E., 8.97 chains; S. 88 deg. E., 1.00 chain; S. 22 deg. E., 2.00 chains; S. 45 deg. W., 12.50 chains; S. 36 deg. 30′ W., 2.50 chains; S. 72 deg. 06′ W., 6.51 chains to meander corner to fractional
388 sections 19 and 30 of said twp. and range; thence west 10.60 chains to the one-fourth section corner between sections 19 and 30 aforesaid; thence N. 48 deg. E., 9.90 chains; N. 40 deg. E., 14.25 chains; N. 49 deg. W., 3.75 chains to the point of beginning, containing 23.62 acres, more or less.

Also, beginning at the one-fourth section corner on township line between sections 25 and 30, twp. 2 north, ranges 13 and 14 east; thence N. 71 deg. E., 16.15 chains; N. 57 deg. E., 9.50 chains; N. 52 deg. E., 3.65 chains; N. 26 deg. E., 8.35 chains; N. 41 deg. E., 5.00 chains; N. 23 deg. E., 6.65 chains; N. 8 deg. W., 5.65 chains; N. 60 deg. E., 9.50 chains to the one-fourth section corner between sections 19 and 30, twp. 2 N., R. 14 east; thence east 10.60 chains to the meander corner between fractional sections 19 and 30 aforesaid; thence S. 68 deg. W., 5.00 chains; S. 40 deg. W., 9.35 chains; S. 62 deg. W., 5.70 chains; S. 44 deg. W., 6.65 chains; S. 38 deg. W., 4.20 chains; S. 30 deg. W., 10.00 chains; S. 54 deg. W., 3.70 chains; S. 48 deg. 30′ W., 16.00 chains; S. 80 deg. 30′ W., 1.00 chain; S. 13 deg. W. 3.00 chains; S. 18 deg. 00′ W., 2.20 chains; S. 67 deg. 27′ W., 9.42 chains to township line; thence north 1.00 chain to meander corner to fractional sections 25 and 30, twp. 2 N., R. 13 and 14 east; thence north 8.50 chains to the point of beginning, containing 23.97 acres, more or less, and altogether containing 47.59 acres, more or less, according to the survey thereof, and being shore land situated in front of lots 1, 2, 3, 4, 5, sec. 30 and lot 5, sec. 19, twp. 2 north, range 14 east, W. M., all as shown by the plat and field notes of the above described shore land, filed in the office of the commissioner of public lands of the State of Washington, at Olympia, Washingington, on the 28th day of January, 1896, containing 47.59 acres, more or less, according to the survey thereof.

389 And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land,

and to pay therefore the full sum of seven hundred thirteen and 85/100 (713.85) dollars in the manner following, that is to say:

The sum of $71.43 at or before the execution of this mortgage contract, the receipt whereof is hereby acknowledged.

The sum of $71.38, principal, and $28.03 interest, on the first day of March, 1897.

The sum of $71.38 as principal, and $34.24 interest, on the first day of March, 1898.

The sum of $71.38, principal, and $29.96 interest, on the first day of March, 1899.

The sum of $71.38, principal, and $25.68 interest, on the first day of March, 1900.

The sum of $71.38, principal, and $21.40 interest, on the first day of March, 1901.

The sum of $71.38 principal, and $17.12 interest, on the first day of March, 1902.

The sum of $71.38 principal, and $12.84 interest, on the first day of March, 1903.

The sum of $71.38 principal, and $8.56 interest, on the first day of March, 1904.

The sum of $71.38 principal, and $4.28 interest, on the first day of March, 1905.

And the said second party covenants and agrees to pay said principal sum and interest as above specified at the rate of six per cent per annum in gold coin of the United States, at the office of the State treasurer at the capital of the said State, and that he will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises, and that if said second party shall fail to pay any of
390 the sums above specified, either of principal, interest, taxes, or assessments, when the same shall become due and for six months thereafter, he will, on demand of the board of State land commissioners or other authorized officer of the State, quietly and peaceably surrender the possession of the above described land and premises and every part thereof; and upon the failure to pay as above specified, all rights of said purchaser under this contract may, at the election of said board of State land commissioners acting for the State of Washington, and without notice to said purchaser, be declared forfeit, and when so declared forfeited and thereupon the State shall be released from all obligation to convey said land; and all payments theretofore made on this contract, and any and all improvements made on said land, or any part thereof, shall thereupon be forfeited to and belong to said State of Washington.

But if said party of the second part shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by him to be kept and performed, in the manner and at or before the times above specified, he shall be entitled to a patent to said land from said State of Washington as provided by law upon surrender of this contract and cancellation of same.

The terms of this contract shall be binding in favor of and against the said party of the second part, his heirs, executors, administrators, and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions

hereof on his part, nor be recognised nor admitted by said State of Washington, unless the same shall be endorsed hereon and executed, witnessed, and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment shall be accepted by and entered on the records of the commissioner of public lands;
391 nor shall any such assignment of the party of the second part for less than the entire interest of said party to the whole of the lands described above be recognized or admitted.

In testimony whereof the party of the first part, by the commissioner of public lands, and the party of the second part have hereunto subscribed their names in duplicate.

THE STATE OF WASHINGTON,
By W. T. FORREST, [SEAL.]
Commissioner of Public Lands.

S. FARRELL, *Purchaser,*
P. O. address, Portland, Oregon.

Witness the signature of purchaser:
H. R. EVERDING,
J. S. HONEYMAN.

STATE OF OREGON, *County of Multnomah, ss:*

I, Ernest DeLashmutt, do hereby certify that on this 11th day of June, 1896, personally appeared before me S. Farrell, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 11th day of June, A. D. 1896.

[SEAL.] (Signed) ERNEST DELASHMUTT,
Notary Public for Oregon.

392 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES OF AMERICA, ET AL. COMPLAINANTS,
vs.
WINANS BROTHERS, DEFENDANTS. } No. .

Stipulation.

It is hereby stipulated by and between the respective counsel for the complainants and defendant herein:

First. That on January 28th, 1896, S. Farrell duly filed, with the commissioner of public lands for the State of Washington, his two certain applications, number 2332 and number 2333, by the former of which he sought to purchase the shore lands lying in front of lot one, section 25, township 2 north, range 13 east, Willamette meridian, and by the second of which he sought to purchase the shore lands lying in front of lot 5, section 36, in the above-mentioned township and range.

Second. That on March 2d, 1896, S. Farrell duly filed, with the commissioner of public lands for the State of Washington, his other certain application, number 2459, by the which he sought to purchase the shore

lands lying in front of lots 1, 2, 3, and 4, section 19, township 2 north, range 14 east, Willamette meridian, and lot 6, section 36, township 3 north, range 13 east, Willamette meridian.

Third. That on April 14th, 1896, the United States, through William H. Brinker, acting for them and on their behalf, as United States attorney, duly filed, with the commissioner of public lands for the State of Washington, separate protests against the granting of each of the said applications of the said S. Farrell above mentioned, and praying in that behalf that they each be denied and rejected. That a copy of the protests so filed, is hereto annexed, marked "Exhibit A," and the other two protests so filed were each in substantially the same words as the said Exhibit A.

393 Fourth. That on the 30th day of April, 1896, the commissioner of public lands for the State of Washington made findings upon each of said applications, a copy of which said findings as to one of the said protests is hereto annexed and marked "Exhibit B," and the other copies of each of the said other two findings so made were substantially in the same words as Exhibit B, except that in each of them there is set forth further that the protest was disallowed by the commissioner of public lands for the further reason that the said protest was not presented until after the completion of the publication of the notice as required by section 77, Chapter CLXXVIII of the Session Laws of 1895.

Fifth. That thereafter and prior to the 24th day of September, 1896, the contracts introduced in evidence were executed.

Sixth. That no appeal or other proceedings have been had or taken against the said decisions of the said commission or any of them.

F. C. ROBERTSON,
Of Solicitors for Complainants.

F. P. MAYS,
Of Solicitors for Defendants.

394 Before the board of equalization and appeal of the State of Washington.

In the matter of the application of S. Farrell, of Portland, Ore., to purchase shore lands of the second class, situate in Klickitat County, Washington.

Notice of contest.

To the above board of equalization and appeal, and to the above-named S. Farrell, and to all other concerned, take notice:

That the United States of America and L. T. Erwin, as agent in charge of the Yakima Indians, and White Swan and Thomas Simpson, for themselves and for and on behalf of all the members of the Yakima Nation of Indians, do hereby contest and object and protest against the consideration or allowance of the application of said S. Farrell, of Portland, Oregon, to purchase the following described shore lands of the second class, situate in Klickitat County, Washington, or any part thereof, said lands being described as follows:

Beginning at the meander corner to fractional sections 19 and 20, twp. 2 N., R. 14 east, W. M.; thence south 11.50 chs.; S. 67 deg. W., 5.83

chs.; S. 24 deg. W., 8.07 chs.; S. 46 deg. W., 8.70 chs.; S. 34 deg. 38′ W., 8.22 chs.; S. 17 deg. W., 17.50 chs.; S. 54 deg. E., 1.78 chs.; west 4.42 chs.; from which the ¼ section corner, between sections 19 and 30, twp. 2 N., R. 14 east, bears S. 34 deg. 24′ W., 24.24 chs.; thence north 49 deg. W., 3.75 chs.; N. 10 deg. W., 3.25 chs.; N. 27 deg. E., 23.00 chs.; S. 67 deg. E., 6.65 chs.; N. 46 deg. E., 4.20 chs.; N. 24 deg. E., 20.00 chs.; N. 10 deg. 14′ E., 2.92 chs., to point of beginning, containing 18.545 acres more or less, and being shore land, situate in front of lots 1, 2, 3, and 4, sec. 19, twp. 2 N., R. 14 east, Willamette Meridian. Reference is hereby made to a plat of the survey of said above-described shore land, marked "Exhibit 'A,'" and made a part of said application.

Also the following described shore land, beginning at the M. C. to fractional sections 35 and 36, twp. 2 N., R. 13 E., W. M.; thence S. 35 deg. E., 4.70 chs.; N. 80 deg. 15′ E., 6.60 chs.; N. 58 deg. 15′ E., 12.65 chs.; N. 69 deg. E., 0.04 chs.; from which the M. C. to fractional sections 25 and 36, twp. 2 N., R. 13 east, bears N. 18 deg. 25′ E., 52.08 chs.; thence south 2.38 chs.; S. 61 deg. W., 0.45 chs.; S. 68 deg. 39′ W., 11.18 chs.; S. 80 deg. 15′ W., 6.60 chs.; N. 35 deg. W., 4.70 chs., to place of beginning, containing 1.33 acres, and being shore land, situate in front of lot 6, section 36, twp. 2 N., R. 13 east, W. M.

And as grounds of contest these contestants state that before the State of Washington was admitted into the Union, and long before the passage of the act of the legislature of said State for the appraisement and disposal of tide and shore lands, to wit, on the 9th day of June, 1855, certain Indians and tribes of Indians, who then and there occupied and claimed all lands lying north of the middle of the channel of the Columbia River, entered into a treaty, under and by the name of the
395 Yakima Nation of Indians, with the United States of America, which said treaty was ratified by the Senate of the United States on the 8th day of March, 1859, and proclaimed by the President of the United States on the 18th day of April, 1859; that in and by the terms of said treaty, it was agreed that the said Yakima Nation of Indians were, by the said treaty, secured in the right of taking fish at all usual and accustomed places upon said Columbia River, in common with the citizens of the Territory of Washington, and of erecting temporary buildings for curing said fish; that the said treaty is still in force and binding upon said Indians, and upon the said Territory of Washington, and upon the State of Washington, and upon all of the citizens thereof; that the above-described lands are a part of the lands upon which and over which, during high water and other stages of the water in the Columbia River, the said Indians were, at the date of said treaty, accustomed to take fish, and the same was one of the usual and accustomed fishing places within the meaning, language, and intent of said treaty, which was by said treaty secured to said Indians.

That the said treaty rights of said Indians have ever since been exercised and enjoyed by them, and the same have been recognized by the laws and courts of the said Territory and State of Washington; that the said fishery rights so secured to said Indians are of great value to said Indians, and afford to them a large part of their means of subsistence; and if the lands should be sold, such sale would interfere with the free enjoyment of said fishery rights by said Indians, and compel the said

Indians, at great cost, to protect and enforce their said rights by litigation in the courts, and thereby cause great damage and injury to said Indians. That the said lands are of no value for any purpose whatever, except for the purpose of taking fish from the said Columbia River, and for preserving such fish.

Wherefore these contestants pray that the said application of the said S. Farrell be denied and rejected.

WM. H. BRINKER,
United States Attorney, Appearing for Contestants.

STATE OF WASHINGTON, *County of King, ss:*

Wm. H. Brinker, being first duly sworn, upon his oath says that the facts stated in the foregoing notice of contest are true as he verily believes.

Subscribed and sworn to before me this day of , 1896.

396 (Copy.)

State of Washington, office of Commissioner of Public Lands. In the matter of the application of S. Farrell, #2459, to purchase shore lands in Klickitat County, Washington.

THE UNITED STATES OF AMERICA ET AL., PROTESTANTS,
vs.
S. FARRELL, APPLICANT.

Findings.

On the 14th day of April, 1896, there was filed in this office a protest, made by W. H. Brinker, as attorney for the United States of America, L. T. Erwin, agent in charge of the Yakima Indians, White Swan and Thomas Simpson for themselves, and for and on behalf of all the members of the Yakima Nation of Indians, against the consideration and allowance of the application of S. Farrell, #2459, of Portland, Oregon, to purchase certain shore lands in Klickitat County, Washington, described in said application #2459.

It appears from said protest that the Yakima Nation of Indians entered into a treaty with the United States of America, and that such treaty was ratified by the Senate of the United States on the 8th day of March, 1859, and proclaimed by the President of the United States on the 18th day of April, 1859. That by the terms of said treaty it was agreed that the said Yakima Nation of Indians were secured in the right of taking fish at all usual and accustomed places upon the Columbia River, in common with the citizens of the Territory of Washington, and of erecting temporary buildings for curing said fish; that the said treaty is still in force and binding upon the said Indians and upon the said Territory of Washington, and upon all of the citizens thereof; that the lands applied for by said S. Farrell are a part of the lands upon which and over which, during high water and other stages of the water in the Columbia River, the said Indians were at the date of said treaty accustomed to take fish, and the same was one of the usual and accustomed fishing places within the language, meaning, and intent of said treaty.

397 That the said treaty rights of said Indians have ever since been exercised and enjoyed by them, and the same have been recognized by the laws and the courts of the said Territory and State of Washington. Said treaty, according to said protest, was intended simply to secure to the Yakima Nation of Indians "the right of taking fish at all usual and accustomed places upon said Columbia River in common with the citizens of the Territory of Washington, and of erecting temporary buildings for curing fish." Said protest further recites "that the said treaty rights of said Indians have ever since been exercised and enjoyed by them, and the same have been recognized by the laws and the courts of the said Territory and State of Washington."

Section 1, Article XVII of the constitution of this State provides as follows: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State."

The said treaty secured to the Yakima Nation of Indians the right to fish on said land "in common with the citizens of this State."

No exclusive right was intended to be conferred. It seems that such common right is sufficiently guaranteed by that portion of the constitution above quoted, and that such "right has been recognized by the laws and the courts of the said Territory and State of Washington."

Chapter CLXXVIII, Session Laws of 1893, provides for the sale of such lands as are applied for by said Farrell.

It is not deemed necessary to fix a date for hearing testimony in proof of the allegations made in said protest, for, admitting that they are true, there is no reason shown why the said application to purchase should not be allowed. The application of S. Farrell shows that he has complied with all requirements of law, and there being no showing made by said protestants or any other person to the contrary, the said protest is dismissed.

Dated at Olympia, Washington, this 30th day of April, 1896.

W. T. FORREST,
Commissioner of Public Lands.

(Here follows map marked page 397½.)

398 In the circuit court of the United States for the district of Washington, southern division.

UNITED STATES ET AL., PLAINTIFFS,
vs.
LEBBAS WINANS AND AUDOBON WINANS, partners as Winans Bros., defendants.

Report and certificate of special examiner.

To the Honorable Court:

In pursuance of an order of this court, made and entered on the 12th day of November, 1896, at Walla Walla, Washington, appointing me, the undersigned, a special examiner to take and report the testimony in the above-entitled cause, I do now respectfully report to the honorable court as follows:

I hereby certify that the foregoing is all the testimony taken in the foregoing cause, and the action taken therein, and that the exhibits and stipulations thereto attached are all the exhibits and stipulations offered in evidence by the respective parties.

I certify that I began taking testimony at North Yakima, Washington, on the 6th day of May, 1897, in accordance with a stipulation entered into by counsel for plaintiffs and defendants.

Present: Hon. F. C. Robertson, assistant U. S. district attorney, for plaintiffs, and Mr. F. P. Mays, attorney for defendants, and defendants in person.

Charlie Wannasey, sworn as interpreter of Indian testimony.

399 On May 6th and 7th, 1897, the following witnesses having been subpœnaed, were sworn, and testified on behalf of plaintiffs:

Thomas Simpson, White Swan, Charlie Dick, Moses Strong, You Youan, Sam Yen-nen-klach Walker, Old Winea, Louie Simpson, Charlie Ike, Charlie Snowyer White Salmon, Wah-me-nashet, Charlie Colwalsh, Charlie Wannasey, and Lancaster Spencer.

Also a plat filed by plaintiffs, showing the Tumwater fishery, the Columbia River, and adjacent lands thereto, marked "Plaintiffs' Exhibit A."

And I certify that by agreement of counsel for plaintiffs and defendants, the testimony in this cause is to be taken at North Yakima and such other places as counsel may agree upon to facilitate the examination of witnesses. In pursuance of this agreement, this hearing was adjourned to meet at The Dalles, Oregon, May 18th, 1897.

Pursuant to agreement by counsel for plaintiffs and defendants, the taking of testimony was resumed at The Dalles, Oregon.

All the parties present on May 18th, 19th, 20th, and 21st, when further testimony on part of plaintiffs and defendants was taken, and the following witnesses having been duly subpœnaed, testified on part of plaintiffs:

Sam Tennewasha, Charlie Kath-lumit, Joe Ko-locken, Bill Sahi-am, Bill Charlie, William Spedius, Charlie Winea, Twash Pan, Martin Spedius, Mary Spedius, Rev. J. H. Wood, Capt. M. Martineau, James H. Coventon; Thomas Simpson and H. E. Hammond were subpœnaed, but did not testify.

400 Two photographs of the Tumwater fisheries, showing the Columbia River and adjacent land, were introduced by plaintiffs and filed.

Witnesses for defendant' testifying, but not subpœnaed, as follows: Leon W. Curtis, Dr. V. T. Cook, Frank P. Taylor, F. S. Souffert, William D. Gilmore, M. Whealdon, Lincas Winans, defendant, Audubon Winans, defendant, and A. H. Curtis.

By agreement of counsel for plaintiffs and defendants, the hearing was adjourned to meet at Vancouver, Washington, on May 22nd, 1897, there to take further testimony on part of plaintiffs, and abstracts from the United States land office at Vancouver.

On May 22nd, 1897, at Vancouver, Washington, pursuant to agreement, the taking of testimony was resumed; all parties present.

The following witnesses having been duly subpœnaed were sworn and examined on behalf of plaintiffs:

John O'Keane and James J. O'Keane.

Letters to registrar and receiver, U. S. land office at Vancouver, Washington, and telegram to registrar and receiver, U. S. land office, Vancouver, Washington, were introduced by plaintiffs, and certified copies filed, marked, respectively, "Plaintiffs' Exhibit B" and "Plaintiffs' Exhibit C."

By agreement of counsel for plaintiffs and defendants, hearing was adjourned to meet in Portland, Oregon, on May 24th, 1897, there to take further testimony.

401 On May 24th, 1897, at Portland, Oregon, the hearing was resumed.

Witnesses sworn and testified for defendants:

Hollister D. Maguire, Lewis T. Barrin.

The following documentary evidence of defendants offered and filed:

Patent United States to Orson D. Taylor.
" " " to William P. Murphy.
" " " to William Taylor.

Being the lands in question in this cause.

By agreement between counsel the testimony was then closed, providing that a stipulation between counsel could be agreed to relative to the contract of purchase of shore lands in the State of Washington by S. Farrell, and protest thereto by the United States through its attorneys which is to be filed as evidence in this cause, together with a stipulation, provided, that if counsel for plaintiffs and defendants can not agree upon the stipulation referred to, then further testimony is to be taken upon this point.

August 20th, 1897, stipulation filed on above point referred to, and testimony closed by both parties.

And I further certify that eight days were actually consumed in the taking of testimony and the necessity of travel and expense and intervening days, from North Yakima, Washington, to The Dalles, Oregon, thence to Vancouver, Washington, thence to Portland, Oregon, thence returning to North Yakima.

402 And I further certify that at my own expense I employed Mr. Fred Miller as stenographer, the counsel for plaintiffs and defendants agreeing thereto.

That by the count of the stenographer there are 1,154 folios in the original testimony, being filed herewith, and that a copy of the same has been furnished to the attorneys for plaintiff' at their request, also a copy to defendants' attorney at his request; that there are 499½ folios in defendants' testimony.

I further certify that the cost bill for witnesses subpœnaed and testifying on behalf of the Government, as paid by the United States marshal for the district of Washington, is filed with the clerk of the court on even date herewith.

All of which is respectfully submitted to the honorable court.

Dated, this 21st day of October, 1897.

S. C. KENTON, *Special Examiner.*

403 *Fishing license.* No. 32.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Apr. 10, 1895.

I hereby certify that Winans Bros., of North Dalles, Washington, has paid to me the annual license fee of $10, required by the act of February 10, 1893, and is entitled, and is hereby licensed, pursuant to the provisions of said act, to fish with fish wheel No. 32, at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #27 in 1894.

In Columbia River, Klickit Co., Wash., off lots I, sec. 25, Twp. 2 N., R. 13 east, W. M.

Fishing license. No. 1.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 23, 1895.

I hereby certify that John Harrington, of Brookfield, Washington, has paid to me the annual license fee of $10.00, required by the act of February 10, 1893, and is entitled, and is hereby licensed, pursuant to the provisions of said act, to fish with fish wheel No. 1, at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: Description of location on back of license.

(Endorsed on back of license:) Located in Columbia River in front of lot 5, sec. 19, township 2 N., R. 14 E, W. M., at the point which projects from said lot into Columbia River.

404 *Fishing license.* No. 9.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 29, 1895.

I hereby certify that Audobon Winans, of The Dalles, Oregon, has paid to me the annual license fee of $10, required by the act of February 10, 1893, and is entitled and is hereby licensed pursuant to the provisions of said act, to fish with fish wheel No. 9 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #22 in 1894, located in Columbia River, off lot 5, sec. 36, Tp. 2 N., Range 13 E., W. M.

Fishing license. No. 10.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 29, 1895.

I hereby certify that Audubon Winans, of The Falles, Oregon, has paid to me the annual license fee of $10, required by the act of February 10, 1893, and is entitled and is hereby licensed pursuant to the provisions of said act, to fish with fish wheel No. 10 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #23 in 1894. In Columbia River, near lot 6, sec. 36, Tp. 2 N., of R. 13 east, W. M.

405 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, plaintiffs,
vs.
AUDUBON WINANS (SUED AS JOHN DOE WINANS), and Linnaeus Winans (sued as Richard Roe Winans), partners doing business under the firm name of Winans Bros., defendants. } No. 122.

Exceptions to decree.

Come now the plaintiffs, by Edward E. Cushman, assistant United States attorney, and except to the judgment and decree herein made this 28th day of May, 1903, and each and every part thereof. Plaintiffs further except to the findings of the court that they are not entitled to the relief for which prayer is made, and further except to the finding

and conclusion of the court that there is no equity in plaintiffs' cause. Plaintiffs further except to the court's order and decree dismissing said case and cause.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

Each and all of the foregoing exceptions allowed, and good cause appearing therefor, plaintiffs are allowed ninety days in which to prepare, serve, and file their bill of exceptions herein.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court, dist. of Washington, May 28, 1903. A. Reeves Ayres, clerk. H. M. Walthew, deputy.

406 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON and White Swan, complainants,
vs.
LINNEAS WINANS AND AUDUBON WINANS, partners doing business under the firm name of Winans Brothers, defendants. } No. 122.

Bill of exceptions.

Upon the final hearing and argument of this suit at Seattle on the 20th day of May, 1903, the following proceedings were had:

This cause having come on at that time for hearing and final argument upon the merits, the plaintiffs appearing by Edward E. Cushman, esq., assistant United States attorney for the district of Washington, and the defendants by F. P. Mays, esq., their attorney; thereupon, the defendants offered in evidence in their behalf four certain fish licenses, duly issued and signed by James Crawford, fish commissioner for the State of Washington, and numbered, respectively, licenses A, B, C, and D, which said licenses it was mutually agreed by the parties hereto were duly issued by the State of Washington on the dates they respectively bore, to the persons therein named, and that such licenses were held by the defendants, and that the defendants were fishing under them during the time covered by them and at the times of fishing complained of in the plaintiffs' bill of complaint; that said fishing licenses were in words and figures as follows:

Fishing license. No. 32.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Apr. 10, 1895.

I hereby certify that Winans Bros., of North Dalles, Washington, has paid to me the annual license fee of $10, required by the act of February 10, 1893, and is entitled and is hereby licensed pursuant to the provi-

sions of said act, to fish with fish wheel No. 32 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #27 in 1894.

In Columbia River, Klickitat Co., Wash., off lots 1, sec. 25, Twp. 2 N., R. 13 east, W. M.

407 Fishing license. No. 1.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 23, 1895.

I hereby certify that John Barrington, of Brookfield, Washington, has paid to me the annual license fee of $10.00 required by the act of February 10, 1893, and is entitled, and is hereby licensed pursuant to the provisions of said act, to fish with fish wheel No. 1 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: Description of location on back of license.

(Endorsed on back of license:) Located in Columbia River, in front of lot 5, sec. 19, township 2 N., R. 14 E., W. M., at the point which projects from said lot into Columbia River.

Fishing license. No. 9.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 29, 1895.

I hereby certify that Audubon Winans, of The Dalles, Oregon, has paid to me the annual license fee of $10 required by the act of February 10, 1893, and is entitled, and is hereby licensed pursuant to the provisions of said act, to fish with fish wheel No. 9 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #22 in 1894, located in Columbia River, off lot 5, sec. 36, tp. 2 N., range 13 E., W. M.

Fishing license. No. 10.

OFFICE OF FISH COMMISSIONER,
STATE OF WASHINGTON,
Vancouver, Wash., Mar. 29, 1895.

I hereby certify that Audubon Winans, of The Dalles, Oregon, has paid to me the annual license fee of $10 required by the act of February 10, 1893, and is entitled, and is hereby licensed pursuant to the provisions

of said act, to fish with fish wheel No. 10 at all lawful times and in all lawful ways in the waters of the State of Washington during the year ending March 31, 1896.

JAMES CRAWFORD,
Fish Commissioner, State of Washington.

Remarks: #23 in 1894. In Columbia River, near lot 6, sec. 36, tp. 2 N. of R. 13 east, W. M.

Whereupon it was agreed that defendants' answer should be deemed amended so as to conform to the proofs, and so as to allege that the defendants at the time complained of were duly licensed by the State of Washington to maintain and operate all fishing wheels complained of at the points mentioned, and where they were located on the land in question; and also that since the commencement of this suit the State of Washington has sold all the shore land upon the Columbia River fronting on the premises in question, between said river and the lands patented by the United States to the defendants' gra'tors, and that said defendants had succeeded to and held the States's interest in and to the said
408 shore lands where said fish wheels are located.

It was also further mutually agreed that the bill of complaint should be deemed amended so as to show and allege that that portion of the description of the land therein mentioned as section 25, township 2 north, range 14 east, should read section 25, township 2 north, range 13 east.

Thereupon the said licenses were received in evidence, marked as aforesaid, and it was ordered that the said answer and bill of complaint each be deemed and considered amended as above stated. Whereupon the final hearing was proceeded with and the case was fully argued by counsel for the respective parties, and at the close of the hearing the court, not being fully advised as to what decree should be entered, took the matter under advisement.

UNITED STATES, *District of Washington, ss:*

The foregoing bill of exceptions appearing to have been duly served and filed, and no amendments offered nor objection made to the settlement thereof by the defendants, and said matter of the settlement and certification having been regularly continued to this time, said proposed bill of exceptions appearing to contain all of the material matters occurring in the cause not already a part of the record herein, the same is hereby settled and allowed.

Done in open court this 14th day of November, 1903.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court, dist. of Washington, Oct. 31, 1903. A. Reeves Ayres, clerk. Frank C. Nash, dep.

Due and full service of the within bill of exceptions acknowledged this 26th day of Oct., 1903.

F. P. MAYS, *Attorneys for Defts.*

409 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN DOE WINANS ET AL., DEFENDANTS. } No. 122.

Order.

On motion of Edward E. Cushman, assistant United States attorney, and good cause being shown therefor, and the court being fully advised:

It is ordered that the plaintiff be allowed until the eleventh day of November, 1903, in which to prepare, serve, and file a bill of exceptions herein and complete the record in this case.

Done in open court this 22nd day of October, 1903.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed Nov. 25, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

410 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON and WHITE SWAN, complainants,
vs.
LINNEAS WINANS AND AUDUBON WINANS, partners doing business under the firm name of Winans Brothers, defendants. } No. 122.

Petition for appeal.

The above named plaintiffs, deeming themselves agrieved by the decree made and entered on the 28th day of May, 1903, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 16th day of November, 1903.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

The foregoing claim is allowed and appeal granted without bond.

Dated this 16th day of November, 1903.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court, district of Washington, Nov. 16, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

411 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, complainants,
vs.
LINNEAS WINANS AND AUDUBON WINANS, partners doing business under the firm name of Winans Brothers, defendants.
} No. 122.

Assignment of errors.

The complainants in connection with their prayer and petition for appeal from the final decree of this court to the Supreme Court of the United States, assign for error the following:

1st. That the court erred in its order of November 19, 1895, modifying the injunction order theretofore issued.

2nd. The court further erred in making its final decree herein on May 28th, 1903.

3rd. The court erred in its finding and decission contained in said decree that there was no equity in complainants' cause, and adjudging and decreeing that said cause be dismissed.

4th. The court further erred in its ruling and decision on demurrer made and filed March 31, 1896.

Wherefore plaintiffs pray a review and reversal of said order and decree.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

(Endorsed:) Filed in the U. S. circuit court, district of Washington, Nov. 16, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

412 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, complainants,
vs.
LINEAS WINANS AND AUDUBON WINANS, PARTNERS doing business under the firm name of Winans Brothers, defendants.
} No. 122.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lineas Winans and Audubon Winans, partners doing business under the firm name of Winans Brothers, and to F. P. Mays, their solicitor.

Your are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, D. C., within sixty days from the date of this writ, pursuant to an appeal duly allowed in the circuit court for the district of Washington, and filed in the clerk's office of said court on the 16th day of November, 1903, in a case wherein the United States of America, Thomas Simpon, and White Swan are

appellants, and you are appellees, to show cause, if any, why the decree rendered against said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1903.

C. H. HANFORD,
District Judge, presiding in the Circuit Court for the District of Washington.

Service of the above citation by receipt of copy is hereby admitted this 25th day of November, 1903.

F. P. MAYS,
Attorney and Solicitor for Appellees.

(Endorsed:) No. 122. In the circuit court of the United States for the district of Washington. United States and White Swan, complainants, vs. Lineas Winans et al., defendants. Citation. Filed in the U. S. circuit court, district of Washington, Nov. 16, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

413 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA ET AL., COMPLAINANTS,
vs.
LINNEAS WINANS ET AL., DEFENDANTS.
} No. 122.

Praecipe.

To the clerk of the above-entitled court:

You will please prepare a record upon appeal in the above-entitled cause forthwith and transmit the same to the clerk of the Supreme Court of the United States, duly authenticated. In this record you will please include the following, together with all endorsements, returns, acknowledgements of service and filing marks to be found thereon: The subpœna; original bill of complaint filed July 11, 1895; affidavit of Charley Snowyer; affidavits of Homer Hoffer; affidavit of Wineas filed July 11, 1895; order to issue writ of injunction same date; writ of injunction issued same date; appearance of solicitors for defendants filed Sept. 1, 1895; defendants' demurrer filed Oct. 7, 1895; stipulation filed Nov. 19, 1895; order filed same date; opinion filed March 31, 1896; answer of defendants filed May 19, 1896; replication filed June 10, 1896; opinion dated and filed July 21, 1896; opinion and decision filed Sept. 14, 1896; order of reference to special examiner recorded at page 110 of equity rule book; order allowing compensation of special examiner filed Oct. 22, 1897; opinion and decision of the court upon merits filed Feb. 23, 1903; final decree filed May 28, 1903; report of S. C. Henton, special examiner of Oct. 21, 1897; testimony and evidence taken and filed Oct. 22, 1897; evidence offered on final argument and trial on May 20, 1902,
414 consisting of the copies of four fishing licenses, No. 32, purporting to have been issued under date Apr. 10, 1895; No. 1, on March 23, 1895, and Nos. 9 and 10, under date of March 29,

1895; exceptions filed May 28, 1903; bill of exceptions filed Oct. 31, 1903; order extending time for filing and serving bill of exceptions; petition for appeal and order allowing same; assignment of errors and citation, together with the original citation and copy of this præcipe.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

(Endorsed:) No. 122. In the circuit court of the United States for the district of Washington, southern division. The United States et al. vs. Linneas Winans et al. Præcipe. Filed November 25, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy.

415 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS SIMPSON, and White Swan, complainants,
vs.
LINNEAUS WINANS AND AUDUBON WINANS, partners, doing business under the firm name of Winans Brothers, defendants. } No. 122.

Clerk's certificate.

UNITED STATES OF AMERICA,
District of Washington, ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing four hundred and fourteen (414) pages numbered from one (1) to four hundred and fourteen (414), inclusive, to be a full, true, and correct copy of the record and all proceedings had in the above and therein entitled cause, as the same remains on file and of record in the office of the clerk of the circuit court of the United States for the district of Washington, at Walla Walla, Washington, in the southern division of said district, and that the foregoing pages constitute the transcript of the record on appeal in the above-entitled cause from the circuit court of the United States for the district of Washington, southern division, to the Supreme Court of the United States.

I further certify that I hereto annex and herewith transmit the
416 original citation issued in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of $141.70 and that the same is chargeable to the United States, and will be included in my account for clerk's fees against the United States for the quarter ending December 31st, 1903.

In witness whereof I have hereunto set my hand and the seal of said circuit court, at Walla Walla, Washington, this 31st day of December, A. D. 1903.

[SEAL.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the district of Washington.
By H. B. STRONG, *Deputy Clerk.*

417 In the United States circuit court for the district of Washington, southern division.

UNITED STATES OF AMERICA, THOMAS Simpson, and White Swan, complainants.
vs.
LINEAS WINANS AND AUDUBON WINANS, partners, doing business under the firm name of Winans Brothers, defendants.
No. 122.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lineas Winans and Audubon Winans, partners, doing business under the firm name of Winans Brothers, and to F. P. Mays, their solicitor:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, D. C., within sixty days from the date of this writ, pursuant to an appeal duly allowed in the circuit court for the district of Washington, and filed in the clerk's office of said court on the 16th day of November, 1903, in a case wherein the United States of America, Thomas Simpson, and White Swan are appellants, and you are appellees, to show cause, if any, why the decree rendered against said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1903.

[SEAL.] C. H. HANFORD,
District Judge,
Presiding in the Circuit Court for the District of Washington.

Service of the above citation by receipt of copy is hereby admitted this 25th day of November, 1903.

F. P. MAYS,
Attorney and Solicitor for Appellees.

(Indorsed:) No. 122. In the circuit court of the United States for the district of Washington. United States & White Swan, complainants, vs. Lineas Winans et al. defendants. Citation. Filed in the U. S. circuit court, district of Washington, Nov. 16, 1903. A. Reeves Ayres, clerk. By H. B. Strong, deputy. Rule book, equity, pge. 167.

(Indorsement on cover:) File No. 19213. Washington C. C. U. S. Term No. 180. The United States, Thomas Simpson, and White Swan, appellants, *vs.* Lineas Winans and Audubon Winans partners, doing business under the firm name of Winans Brothers. Filed January 22d, 1904. File No. 19213. Office of the Clerk Supreme Court U. S. Received Jan. 16, 1904.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, THOMAS SIMPSON, and WHITE SWAN, appellants,
v.
LINEAS WINANS AND AUDUBON WINANS, partners, doing business under the firm name of Winans Brothers, respondents. } No. 180.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF FOR APPELLANTS.

THE CASE AND THE PLEADINGS.

This case involves Indian rights of fishery in and on the Columbia River. It is a bill in equity filed by the United States July 11, 1895, in the Circuit Court of the United States for the District of Washington, on behalf of the confederated bands composing the Yakima or Yakama Nation, against the Winans Brothers, who are engaged in a large commercial fishing enterprise at the locality where the Indians claim rights. The defendants assert the right to title in fee to the bordering lands through patents from the

United States, and to the shore from the State, and the right to exclude the Indians altogether from these lands and, as a practical consequence, from access to and participation in the particular fishing places.

The bill shows that for many years prior to 1855 these Indians possessed and claimed the country along the Columbia and from time immemorial fished in its waters in the locality in question on the north shore of the river, having huts there for use during the fishing season and for curing fish for their steady subsistence, pasturing their horses and cattle on the lands bordering the river, with free access to the fishing grounds. These lands were Indian country and were so recognized by the United States. On June 9, 1855, the Government entered into a treaty with them by which they ceded these lands lying north of the Columbia, with certain reservations, and as part of the consideration the United States guaranteed to them for their use in common with citizens of the Territory the right of taking fish "at all usual and accustomed places;" the right of erecting temporary buildings for the purpose of curing fish; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle on open and unclaimed land. The Indians, after as before the treaty, fished and enjoyed their other rights and privileges, as defined, at divers places along the north shore of the Columbia in the township embracing the fishing places involved in this suit, and particularly at those places, until they were interrupted and prevented by the defendants,

who by force and threats have driven them away and refuse to allow them to come to the fishing places, have torn down their houses and refuse to permit them to rebuild. The peculiar formation of the shore line at this locality, with the rocks, channels, and eddies, enabled the Indians to take fish effectively with their dip nets, spears, and other primitive appliances; the defendants maintain and operate large fish wheels, which catch all the fish at the usual runways, and prevent the Indians from taking any fish at all. The claim of the bill was that whatever right and title the defendants might have to lands in the sections bordering on the river was subsequent, subordinate, and subject to the Indian right of way and temporary occupancy for fishing purposes, and the prayer was for an injunction to restrain defendants, their agents, etc., from molesting the Indians and preventing them from taking fish at these accustomed places, from having free access, from erecting and using temporary houses, and for other suitable relief. The affidavits (Rec., pp. 9–11) fully sustain the bill.

An injunction was granted (Rec., pp. 12–16) comprehensively commanding that the Indians should not be interfered with in the enjoyment of any of the rights claimed and specifically directing the defendants to desist from constructing, operating, or maintaining fish wheels in such manner as to prevent the Indians from fishing.

The defendants demurred to the bill, and pending hearing the restraining order was modified in pursuance

of stipulation (Rec., pp. 19, 20, 34)—in which the right thereafter to assert the full claims was reserved to both parties—so as to give the Indians the right of taking fish at the points in controversy in common with the defendants, assuring them free ingress and egress, the use of the bordering lands and of adjacent vacant lands for pasturage. The demurrer was overruled (Rec., pp. 21–24) on the ground that it was an invasion of the rights secured by the treaty to exclude the Indians from the fishing, but that the right to erect temporary buildings at any particular spot ceased when title issued from the Government and was vested as private property; that, however, "the bill states facts sufficient to require the court to enjoin the defendants from interfering with the Indians in the enjoyment of their common right of fishery, although, in my opinion, the court will not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing" (p. 24).

The defendants then answered (pp. 25–32) that the Indian claim covered all lands mentioned in the treaty, as "Indian country" only, and embraced various fisheries along the Columbia as well as the particular localities in suit; that there were no rights peculiar to these localities, but they were common to all the fishing places; that the United States by the treaty was acquiring the Indian title, but that no lands were conveyed to the United States and no lands bordering on the Columbia were reserved for the use of the Indians

for fishing purposes; that the treaty simply secured the right of taking fish at all usual and accustomed places in common with citizens, with the privilege of temporary occupancy, pasturage, hunting, etc., upon unclaimed land in the vicinity, and these rights did not refer to the particular township or locality, but to various places. There were formal denials of customary fishing by the Indians at the points in dispute, resting on the averment that since the particular shore lands were patented the Indians have been prevented by the owners from exercising any rights inconsistent with ownership of the soil except such as the owners saw fit to grant. It was denied that the Indians had been driven from the fishing places by force and intimidation, or their temporary houses destroyed, and that they had been excluded from their rights of fishery by the maintenance of the fish wheels, all such traverses being founded on the averment that the defendants had merely refused to allow the Indians to trespass on patented lands, the absolute title to which had passed from the Government and which the defendants held under bond for a deed. It was asserted that at the place in question, extending along rapids of the Columbia for over a mile, there are many hundreds of points besides those occupied by the fish wheels where the Indians did fish and could still but for the private ownership and the trespass upon patented lands; that at various points along the river above and below there are fishing places where the title to abutting lands is still in the United States; that the defendants

fenced their property to protect their lands for pasturage, inclose their houses and preserve their fruit trees and vegetables; but notwithstanding their exclusive rights the Indians had repeatedly trespassed on the property.

The cause was then put at issue by replication; upon an interlocutory and auxiliary application for warrant in contempt for violating the modified injunction, the court held the showing insufficient (p. 35) on the ground that the fence complained of in that interlocutory application obstructed a mere trail and not an existing road; and the cause was then (November 12, 1896) referred to an examiner to take and report testimony. After final hearing (May 20, 1902) the court filed a memorandum decision on the merits, February 23, 1903, and on May 28, 1903, entered a decree dismissing the bill (pp. 38, 39). Direct appeal to this court was then allowed. As the construction of a treaty is involved, and this ground of jurisdiction embraces an Indian treaty (*New York Indians* v. *United States*, 170 U. S., 1; *United States* v. *Choctaw Nation*, 179 U. S., 494), that course is correct under section 5 of the judiciary act of 1891.

THE TESTIMONY.

The testimony, documentary evidence, and exhibits comprise pages 40–248 of the record.

This is a famous fishery and has been from time immemorial. It covers about a mile and a half of rocky channel and swift current with shore and water conditions most favorable for taking salmon in large quantities—relatively, by the Indian primitive methods,

and absolutely by the modern, wholesale device of fish wheels. In a given time, and a short one, depending, of course, on the season and the "run," the Indians took them by hundreds, the wheel takes them by tons. "They [that is, the defendants] haul them away with four-horse teams;" three or four wagon loads every day. (Rec., pp. 94, 95.)

This fishery was known to the whites from the early days as the "Tumwater," and to the Indians under two names, Wisham, denoting the upper end of the rapids, and Se-we-pam (or See-we-paum), describing the lower end, where the rapids begin to tail off into eddies. It appears clearly enough from the evidence that it is as good a fishery as any on the river, and, on the Washington side and above the lower reaches of the Columbia, toward the sea, plainly the best. It is because it is the best for dip nets that the Indians always resorted there, and because it is the best for the destructive means of wheels that the Winans established themselves there. There can be no doubt that the Indians fished there regularly back to a traditional past, how long no man, Indian or white, can say. They went annually to this fishery, camped there, pastured their animals on the bordering lands, and caught and cured fish in great quantities. It was their staple at all times, fresh or dried; they were raised on this food; they miss it and need it. Their physical condition and general *morale* are less good than when they had an abundant supply. Berries and roots are certainly precarious; there are few deer in that country; it is no answer to

their claim to say that they are as well off now and have merely shifted their dietary; that living on a reservation and attached allotments, as they do or may, they cultivate small farms and eat potatoes and perhaps an occasional slaughtered animal of their own. The reason the Indian does not get as much salmon as he used is because he is not permitted to; he hasn't the money to buy, and that is all there is of it. But he wants salmon and needs it as much as ever.

The Indians testified clearly and strongly on all these points—as to their constant use of dip nets formerly at the points in controversy, which was denied or doubted in a merely speculative sort of way by the defendants and one or two of their witnesses who were also fishermen and interested on that side; as to the belief and understanding among the elder Indians who were cognizant of the treaty negotiations that the United States was guaranteeing and preserving to them a real right which they had always enjoyed and without which they would not have entered into the treaty. It is shown that there was demur over this very matter and the negotiations of Governor Stevens and General Palmer were not successful until the Indians had received complete assurances on the point. The temporary houses at the Se-we-pam end were torn down, the Indians say, with aggressive harshness. At the Wisham end there is some doubt whether a few of the old houses are outside the inclosure; some of them appear to be standing. It makes little difference, because there is no object in occu-

pying them now; fewer Indians approach the place than formerly, of course; they have been driven off year after year and are discouraged. The few who do linger about and return are not permitted to approach the river. It is said they can get to the river along the "Colwash trail," which appears to come down outside the inclosures at the Wisham end, but that is futile. When they get there they can not fish; they are barred by the fence and by force, too, from going along the shore to the fishing points, and altogether from fishing. The notion that there is a road open to the river along or near the side lines of the fence is manifestly illusive, and the defendants, in their own testimony, are much too candid to advance it as a pretext. Notwithstanding Judge Hanford's views concerning the "Colwash trail" (Rec., pp. 35, 36), it is in evidence that among many mere trails running to the river and the fishing places over the patented lands, there was at least one well marked and traveled, 50 feet wide, used for wagons as well as horses, ridden and "packed," which was cut off and closed by the fence. (Seemingly the "middle trail," as the witness Simpson calls it, pp. 45, 46.) The situation of the Indians is far from humorous, but it suggests the old rhyme in which a borrower is told that he can not have his friend's bellows, but can sit by his fire and blow. The Indians can work for the Winans if the latter choose; they can buy salmon at a quarter each. They can have the eels which are thrown away, they can have the heads and tails from

the scrap heap, which are considered by some people the greatest delicacy—"they think they are the very best part of the fish" (Rec., p. 178); they can go to the river along the Colwash trail and sit at that one point and contemplate the Winans wheels running fish out of the river by the ton.

I do not intend to draw upon the pathos of the case, though there is pathos enough in it, except to those who are utterly cynical about virtue in the Indian, hardship in his lot, or merit in his plea that white civilization should not wipe him out with unnecessary haste and cruelty. Pathos alone does not move equity, but the springs of equity and pathos often lie close together.

The Indians were also barred from a spring of water near the Wisham end, from which they had always drawn their supply. Hear what an old Indian man said about their deprivation of fish and the destruction of their houses, and an old woman's view of the spring:

> Q. How old are you?—A. I don't know my age; I am pretty old; I don't know my age.
>
> Q. How old were you when the treaty was made?—A. I don't know how old I was, but I was married and had a boy.
>
> * * * * *
>
> Q. Have you suffered any for food since this fishery has been fenced in?—A. There are lots of time I wished to get something to eat, such as salmon. Now, I have given up all hopes and have made up my mind I am going to starve myself to death.

Q. How many Indians are situated that way?—A. Four of us; we can't hardly help ourselves, except we depend on fish.

Q. How many others are in the same condition?—A. There are a great many that is around here—I don't know how many. They all feel very bad about not getting any salmon, and they think they are going to starve themselves to death.

Q. Explain just the circumstances of the tearing down of your house.—A. I was there at my house, sitting down, not knowing anything; I couldn't tell how many years; pretty soon a man come there and he says to me, "If you don't get out of here I will tear your house down." I did not believe him, that he would do it; pretty soon he put a lasso on our house. I got scared and cried, and put a little barrel on my back and took that and went away crying. He said, "If you go to make any more trouble around here, I will put you in jail." I said, "All right; you can take me." That is all I said to him; what little things I had I was picking up and taking away; I was crying.

Q. How long had you lived in that house?—A. I lived there ever since I can remember—until I am this age now. (Rec., pp. 104–105.)

Q. How many years have you caught fish there, at See-we-pam and Wisham?—A. Never go any other place but there; go there all the time. There was no white people yet; there was only Indian people. My father was taking care of all the Indians there. I don't know when the white people come to this country. I

didn't know they was going to build lots of houses here. When I got to be a woman, then all come; that is the treaty and I was there. Then afterwards some more white people come.

Q. I don't care about the white people coming; I wan't to know about this fishery.—A. I know about catching fish there. My father fished there. We catched salmon here, dried them, and when it was dried we buried it in the ground; that is what we keep for winter's supply. And just now, where the fishing ground is now, Winans put up a fishing wheel there, and the Indians never go there any more. You see I am dry now; I got no flesh on me now. Then, later, he fences clear around; that is the way he treats us now. We can't go. We are afraid to go in the fence there to get water. We dry for water also; we can't get water and we can't get salmon.

Q. Where did you used to get water?—A. There is one spring there then; we go to the river and get water.

Q. How far is that spring from the river, or from your house?—A. Not far. (Rec., pp. 115–116.)

Here are other statements about the spring:

Q. Before it was fenced in, did you get your water from the river?—A. Right next to the river is a spring.

Q. Can you get water there now?—A. The fence is there; I can't go there.

Q. How far is that spring from your house—the one that is fenced in?—A. I can't tell. It is very close. (Rec., p. 92.)

> Q. Where do you get the water from you drink?—A. Mr. Winans told me that I must not go down to this spring to get any water where we had been in the habit of getting water, and we had to go up the fence about half a mile; but sometimes we stole through the fence; crawled under the wire to get our drinking water. (Rec., p. 102.)

I am unable to see what difference it makes that as the river rises and falls a fisherman using a net must move back and forward. There were none the less certain favored and advantageous spots within the mile and a half of river front, which were "usual and accustomed places," where the Indians congregated, changing, of course, from one rock and runway to another, behind or in front, as the water rose and fell. It is plain that the most advantageous spots for the most prolific stage of water have been seized for the three stationary wheels. It is also evident that the lower wheel is located at a particularly famous rock, which by blasting, to place the wheel, has been largely destroyed (it would seem) for Indians' use even if the wheel were removed.

The inquiry whether the fish die after reaching headwaters for spawning, either because of functional consequences or because they are weakened and bruised by their long and rough journey away from the sea, is merely speculative; but the question what proportion of the fish is taken in the wheels is of immediate im-

portance. Of course there would not be wheels one after another all along the river above tide if many fish did not get through any particular wheels. The wheels are numerous enough (thirty-eight altogether, Rec., p. 218), but evidently they do not cover all the channels and runways, even at the narrower and swifter points; and they do not operate like a sieve or net, stopping and catching everything. Many fish get through, of course. If that were not so, it would only take a year or two to destroy this food supply altogether instead of merely diminishing it rapidly as the years pass with the prospect of substantial destruction in a decade or two more. But the wheels successively take an enormous quantity of the fish which reach them. The court will notice that witnesses for the defense testified (Seufert, p. 170; McGuire, rec., p. 217) that in the opinion of experts only about 5 per cent of the annual salmon catch is taken by the wheels. But this includes the entire river from the ocean; in the lower tide waters the fish are caught by nets, large seines, in weirs, traps, and other ways; but fish wheels, as is manifest and well known, can not be operated in tidal waters but only above the first rapids where the current is swift and the channel comparatively narrow. It is only here and there that it is profitable to maintain a wheel. It appeared clearly from one of defendants' witnesses (McGuire, rec., p. 220), that above the tide a very large proportion of the fish is taken in the wheels, cer-

tainly 50 per cent, probably much more. The testimony under cross-examination is as follows:

> Q. What percentage of the catch of the salmon is taken within 20 miles from the mouth of the Columbia—say 50 miles of the mouth of the Columbia?—A. Well, 50 miles, I should say 80 per cent at least, maybe 90, vary somewhat according to the stage of the water which affects the run somewhat. A large percentage, maybe 80 or 90 per cent.
>
> Q. There is no fish wheels at the mouth of river?—A. No, sir.
>
> Q. Then, while it is true that only 5 per cent of the fish have been caught in the fish wheels, it is also true that more than one-half per cent, approximately one-half per cent, of the fish caught in the upper part of the river were caught with fish wheels—that is, I mean one-half of the fish are caught with fish wheels?—A. I think so; probably more.
>
> Q. In fact, when you go up to The Dalles, Seufert's, Winans' and the Salido fishery, practically all of the fish are caught with fish wheels, are they not?—A. A large percentage * * *.

So that the destruction of the fish is very rapid; there are few left for the Indian to catch even if he were allowed to fish, and the Indian complaint of the wheels and the steady depletion due to them is natural. The point of view of the defendants toward the Indians is the same but more thoroughgoing, for they think that every fish taken by an Indian means one less for them. (Audubon Winans, p. 215.)

Much of the testimony showing the verity of the Indian statements and the reasonableness of their claims comes from the defendants' own witnesses. It will not be forgotten that the Indians are not claiming exclusive rights, but only rights in common with others; it is the defendants who are claiming exclusive rights. There is a common right of fishing, but no right in anyone to monopolize. The defendants themselves testified and, as I have said, with entire frankness. If the Indians have any rights at all, their case could be rested almost solely on the testimony of the two Winans brothers (Rec., pp. 195–216), and I particularly commend that portion of the record to the court's notice. Their claim comes to this, that while if the Indians could fish at all, there are other points along this stretch where they could fish despite the wheels, which do not substantially affect the fishing; nevertheless they can not fish at all because the lands have been patented and are owned by the Winans; that the Indians can not cross the lands to come at the fish and can not fish anyway, and are without any rights or privileges whatever except what the Winans may choose to allow of their grace. And that does not appear to be much except blows and threats, expulsion and salmon tails. In short, the Indian has no right which the defendants are bound to respect.

In the light of this position subsidiary questions fall away. It is not worth while, for instance, to ask why the Indians should not from time to time, when the catch was abundant, have sold their moderate surplus.

There was certainly no reason in law or morals why they should not. It is not worth while to point out that if there were other fishing places along the Columbia, they were either the customary places of different bands and tribes, or were not such good fishing places, or were at points which, like this locality, have been inclosed under claim of private title. There was a general allegation in the answer that there were fisheries at places where the title was still in the Government, but that suggestion was left vague, and there was no proof on the subject. In any event the Indians have rights here, or they have not; they can not be shunted off to inferior places on the theory that it is legitimate defense to say that they will do well enough at other points. The best places go first in the commercial, private, and exclusive grasp. Sooner or later it is likely that all the fisheries will follow which it is worth while for the white man to take up. It is merely a question of the margin of profit, and is under an economic law similar to Ricardo's theory of rent. It is also of no consequence to meet the suggestions that one of the Yakima Indians living in the neighborhood has fenced his land and does not permit his fellow-tribesmen to enjoy it in common. That, like the Colwash trail point, seems to me preposterous. The particular Indian has a little, rocky farm; it does not reach the river. The shore strips of the defendants cut it off. There is no intimation that the Indians ever crossed it

or need to cross it to get to the river. It would naturally be fenced, and there is not the slightest proof that this Indian is unfriendly and unneighborly and excludes his fellows from his place, as the white men do, and if there were such proof it would have nothing whatever to do with this case. The defendants could not defend on the ground that there were bad or surly Indians who treat others as the defendants themselves do. All such suggestions fall by the way when the real question is perceived; but it is noteworthy that when the Indians could resort freely to this fishery they gave their surplus fish away to those who were in need, and this is quite in accordance with the instinctive Indian trait of hospitality. (Rec., p. 73.) They were formerly savage, and they may be improvident and shiftless in the face of civilization, which constantly tempts them, but they are generous and hospitable when they have plenty.

The question on this record simply is: What are the respective titles, and have the Indians any right whatever against the defendants' claim under Government patent and the sale of the State shore lands?

I have endeavored to set forth the situation briefly and to restrict the record citations, but I desire to refer the court to the following testimony in addition to that already cited, both of the complainants and the defendants, in which the salient features of the case will be found sufficiently and clearly emphasized: Of the Indian witnesses on behalf of the plaintiffs, Simpson (pp. 44–50); White Swan, the chief (pp. 51–54);

Moses Strong (pp. 59–62); White Salmon Charley, 93 years old, who was an interpreter at the treaty council (pp. 72–74); Bill Charley (pp. 90–99); of the white witnesses, Mr. Wood, the clergyman (pp. 117–124); Captain Martineau (pp. 124–133); of the defendants' witnesses, Frank P. Taylor, one of the predecessors in title (157–168); Seufert (pp. 168–184); Whealdon, who, under O. D. Taylor's ownership, ejected the Indians and removed their houses at Se-we-paum (pp. 188–199); and the two defendants, Lineas and Audubon Winans (pp. 199–207, 207–216).

HISTORICAL COMMENTS AND THE REPORTS.

This treaty and other like treaties with tribes in that locality rested from 1855 to 1859 without ratification. The exact reason can not be discovered, but it is probable (and indeed this is indicated in reports of the intervening years) that the Senate thought the treaties were too liberal. At all events, there were manifestly some objections. On the other hand, many Indians were opposed to the treaties. The chief of the Yakimas was irreconcilable and practically went into exile, although unavailing endeavors were made down to 1860, and perhaps later, to induce him to go on the reservation and help to hold his people together and civilize them. The failure to ratify the treaty of course increased the discontent. There were two or three serious hostile outbreaks among the Yakimas, and the party which had always been opposed to the treaty was enabled to say that the

Government did not intend what it promised, was not carrying it out, and would not, and that although it professed to extinguish the Indian title and give adequate compensation to the Indians surrendering their claims, nevertheless the United States would not ratify the treaty, and permitted white settlers to come in and take up the lands under the general purchase laws, entirely ignoring all the Indian rights. Finally, however, the treaty was ratified, and therefore, whatever the bargain means, the United States as well as the Indians assented to it conclusively.

If it should be suggested that the Indian testimony in this record about the negotiations and promises at the council is not a true statement of what occurred, but is merely colored to suit their present purposes, it is to be remembered that the Secretary of the Interior and the officers of the Indian service have more than once indicated the disparity between our easy promises to obtain treaties and the actual meaning of the instrument negotiated. For instance, in the report of the Secretary of the Interior for 1856 occurs this passage (p. 185):

> The object, throughout, has been to do ample justice to the Indians, and leave no room for the complaint, sometimes heretofore made, that they have been overreached by the white man. Whether such complaint was just or not, there is no doubt the Indians believed, or were persuaded by others, that just grounds existed for its indulgence. It must be admitted, that, in some cases, the "talks" with the Indians,

upon which treaties were based did not correspond with the treaties themselves, and that the Indians generally relied on these "talks," which they recollected and understood, and not on the treaties, as reduced to writing, which they seldom correctly comprehended.

The reports are full of evidences of the greed and aggression of whites and the inability of the Government effectively to protect its wards or its indifference on that subject.

> The existing laws for the protection of the persons and property of the Indian wards of the Government are sadly defective. New and more stringent statutes are required. The relation which the Federal Government sustains toward the Indians, and the duties and obligations flowing from it, can not be faithfully met and discharged without ample legal provisions and the necessary power and means to enforce them. The rage for speculation and the wonderful desire to obtain choice lands which seems to possess so many of those who go into our new territories, causes them to lose sight of and entirely overlook the rights of the aboriginal inhabitants. The most dishonorable expedients have, in many cases, been made use of to dispossess the Indian; demoralizing means employed to obtain his property; and for the want of adequate laws the Department is now often perplexed and embarrassed because of inability to afford prompt relief and apply the remedy in cases obviously requiring them. (Report of Commissioner of Indian Affairs for 1856.)

Speaking of other tribes than these, but accurately also of all Indians throughout the West, the report continues:

> Their condition is critical, simply because their rights and interests seem thus far to have been entirely lost sight of and disregarded by their new neighbors. They may be preserved and civilized, and will be if the guaranties and stipulations of their treaties are faithfully fulfilled and enforced, and the Federal Government discharges its obligations and redeems its pledged faith toward them.

In the report of the Commissioner for 1857 he refers to the critical condition in our relations with these and other neighboring Indians, and says that the non-ratification of the treaties heretofore made to extinguish their title to the lands necessary for the occupancy and use of our citizens seems to have produced no little disappointment, and the continued extension of our settlements into their territory without any compensation being made to them is a constant source of dissatisfaction and hostile feeling.

> They are represented as being willing to dispose of their lands to the Government, and I know of no alternative to the present unsatisfactory and dangerous state of things but the adoption of early measures for the extinguishment of their title and their colonization on properly located reservations, using and applying the consideration agreed to be allowed to them for their lands to subsist and clothe them until they can be taught and influenced to support and sustain themselves.

Again, from the report of the Salem, Oreg., superindent, September 1, 1857 (an exhibit to the Commissioner's report):

> The land laws which permit the occupation and settlement of both Washington and Oregon Territories, regardless of the rights of the Indians, render the intercourse laws practically a nullity. * * * Even the treaties which have been made remain, with but few exceptions, unratified, and of the few that have been ratified but few have been fulfilled. Those delays and disappointments, together with the unfulfilled promises which have been made to them, have had the effect to destroy their confidence in the veracity of the Government agents; and now, when new promises are made to them for the purpose of conciliating their friendship, they only regard them as an extension of a very long catalogue of falsehood already existing.

The reports even in those days constantly refer to the fact that deer and other game are scarce. (And see Rec., p. 137.)

Another report (Yakima agent, August 15, 1860, an appendix to the Indian Commissioner's report for that year), speaking of the Klickitats, with whom no treaty had then been made, says that white settlers have occupied the most valuable places for grazing, field culture, and fishing, driving the scattered and injured Indians from pillar to post, so that but one white settler, and he a former member of Congress, would allow them to remain even temporarily on lands

yet belonging to them. And he adds that the title of such lands "has always heretofore been acknowledged by our Government as vesting in the aboriginal inhabitants till fully treated with and ample compensation allowed."

THE RESPECTIVE TITLES.

The treaty with the Yakimas of 1855 (June 9, 1855, ratified March 8, 1859, proclaimed April 15, 1859; 12 Stat., 951) in the caption described the Indians as occupying the lands bounded and described; and by Article I they "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them and bounded and described as follows," the boundaries and description being then set forth. The general region embraced and the particular tract involved in this controversy are included. By Article II there was *reserved* a tract of land bounded and described, which is the Yakima Indian Reservation. The last paragraph of that article provided that no white man should reside upon the reservation, and the tribes should settle there within one year after ratification; that in the meantime they might reside upon any land not claimed and occupied by citizens, or upon land so claimed or occupied with the permission of the owner or claimant, and the language expresses the guarantee by the Indians that citizens may occupy as settlers any lands not actually occupied and cultivated by the Indians at that time, not included in the reservation. There was a further provision that substantial improvements by

Indians—fields inclosed and cultivated and houses "erected upon the lands hereby ceded," which it may be necessary to abandon because of the treaty, shall be valued and payment made or improvements of equal value made upon the reservation. Article III provided that if necessary for public convenience roads may be run through the reservation, and on the other hand, the right of way, with free access to the nearest public highway, was secured to the Indians, with the right, in common with citizens, to travel upon all public highways. That article then expressed the particular provision now before the court, as follows:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The remaining provisions of the treaty were these: Article IV, "in consideration of the above *cession*," provided for payments of money by the United States, and directed the manner of its expenditure. Article V expressed the agreement of the United States to establish schools, build mechanics' shops, a sawmill, a flouring mill, and a hospital, which buildings and establishments were to be maintained and kept in repair. That article also provided for a sal-

ary to the chief. Article VI provided for a survey of the reservation and assignment of lots to Indians for permanent homes. Article X "reserved and set apart from the lands ceded by this treaty" for the use of the Indians the Wenatshapam fishery, subject to the usual provisions and restrictions concerning Indian reservations. This specially reserved fishery was ceded to the United States by an agreement concluded January 8, 1894, and approved by Congress by the act of August 15, 1894 (28 Stat., 320). The Indians received $20,000 for this fishery, and the language of the agreement is that "the said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of, in and to all their right of fishery as set forth in Article X of said treaty aforesaid," etc.; and the United States paid that sum "in consideration of the foregoing cession and relinquishment" (see also record, p. 52).

Thus it is evident that this was not a mere treaty of peace and amity with the Indians, or of "friendship, limits and accommodation," providing for annuities in goods or money, but was in fact and law a treaty of cession of lands by accurate description and on consideration duly expressed.[a] Regarding the peculiar

[a] The different kinds of treaties with the Indians are thus described in the report of the Secretary of the Interior for 1856: "These treaties are of three classes—of peace and friendship; of acquisition, with a view to the colonization of the Indians on reservations; for providing for the permanent settlement of individual Indians upon separate tracts of land, as homesteads, and extinguishing at once or paving the way to the final abandonment of the tribal character." See also the report of the Commissioner of Indian Affairs for the same year for a more precise description of the differences.

nature of the Indian relation and their status as semi-independent domestic nations, with our sovereign power and title however paramount, it may be that in the strict and technical aspect they did not reserve but merely quitclaimed and received a grant back. Plainly, however, there can be no doubt that the proceeding was an accommodation of mutual advantage and convenience, and that on the whole the United States received at least as much as it gave. It was notorious, of course, that the Indians always demurred and thought that being under compulsion in the last analysis, they gave more than they got. In short, by the treaty the United States received a definite cession of lands and wiped out the Indian title and claim and reserved or granted to the Indians, under the guarantee of the national responsibility and honor, equally definite things, viz, a reservation by metes and bounds, an exclusive right of fishery in the reservation streams, a common right of fishery at all usual and accustomed places, with the attached privileges, and a separate, exclusive reserved fishery which was afterwards sold to the United States. There is no reason whatever why the common of fishery is not as real a right and as susceptible of determination as any other of the reserved rights. The only question is, what does it mean legally, and what effect does it have upon the later patents.

Various provisions of law regarding Territorial and Indian relations in that locality throw light upon our inquiry. Thus, in the organic act to establish the Ter-

ritorial government of Oregon (Aug. 14, 1848, 9 Stat., 323) there is this proviso:

> *Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed: * * *

At that time Washington was included in the Territory of Oregon. In the organic act respecting Washington (March 2, 1853, 10 Stat., 172) the proviso is to the same general effect, but in briefer form, viz:

> *Provided*, That nothing in this act contained shall be construed to affect the authority of the Government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this act had never been passed.

Paragraph 3, section 4, act of February 2, 1889 (25 Stat., 676), admitting Washington and other States, provides:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropri-

> ated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * *

This provision was expressly accepted by Article XXVI of the constitution of Washington.

Article XVII, section I, of that constitution asserts the State ownership of shore lands as follows:

> The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State.

The nature of the Indian title to lands, in general, is as follows: The United States, as sovereign and owner, has complete dominion and title. The Indians, as domestic, dependent nations, had or have possession and the right of occupancy, and this right is as sacred as that of the United States to the fee. It is incumbent, however, on the United States, in law and ethics, notwithstanding their absolute underlying rights as suc-

cessors to the former sovereignties and in the rights of discovery and conquest, to extinguish the Indian title to particular and definite tracts by agreements of cession and on terms of bargain and sale. The United States is bound, on the highest compulsions and sanctions controlling human institutions, to deal with the Indians on the most liberal doctrines of construction and the most generous rules of duty and obligation to inferiors known to our national principles and in international law. (*Fletcher* v. *Peck*, 6 Cr., 87; *Johnson* v. *McIntosh*, 8 Wh., 543; *Cherokee Nation* v. *Georgia*, 5 Pet., 1; *Worcester* v. *State of Georgia*, 6 Pet., 515; *United States* v. *Cook*, 19 Wall., 591.) These determinations as to the Indian rights were expressed as follows, aptly enough in point of time and accuracy, regarding the present controversy, in the report of the Secretary of the Interior for 1857:

> The members of the Indian tribes within our limits, while they are not citizens, can not, with strict propriety, be termed foreigners. "Domestic dependent nations, their relations to the United States resemble those of a ward to his guardian. They look to our Government for protection and appeal to it for relief to their wants." While we negotiate treaties with them, which are ratified with all the solemnity befitting a contract to which nations are parties, we undertake to construe and execute their provisions, acknowledging no responsibility but such as we may owe to truth, honor, and justice. As the limits of our civilization have been extended the number of these children of the forest

with whom our people are brought into immediate contact is greatly increased. Treaties multiply; rights are acquired; mutual obligations are assumed; obedience is promised on the one part, protection is guaranteed on the other.

In *Worcester* v. *State of Georgia* (*ut sup.*) Mr. Justice McLean in his concurring opinion said:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

This language was quoted and approved in *Choctaw Nation* v. *United States* (119 U. S., 1), and in *Jones* v. *Meehan* (175 U. S., 1). In the former case the court added:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care

> and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules.

And in *Jones* v. *Meehan*, Mr. Justice Gray said that an Indian treaty should be construed "Not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The title of the defendants is deduced as follows: The lands involved were conveyed by three patents from the United States, viz:

(1) Patent dated July 2, 1866. Conveys to William P. Murphy—

> Lot 1, in section 17;
> Lot 2, in section 19; and
> Lots 4 and 5, in section 30, in township 2 north, of range 14 east, containing 70½ acres. (Rec., p. 233.)

There is no reservation or condition in this deed.

(2) Patent dated September 20, 1869. Conveys to William Taylor—

> Lot 5, section 19;
> Lots 1, 2, and 3, section 30; in township 2 north, of range 14 east, containing 99 acres. (Rec., p. 234.)

There is no reservation in this patent.

(3) Patent dated May 10, 1889, conveys to Orson D. Taylor—

> Lots 1, 2, and 3, and the northeast ¼ of the

> southwest ¼ of section 25, township 2 north, of range 13 east, containing 164¾ acres. (Rec., p. 232.)

The patent contains this reservation:

> To have and to hold the same * * * subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, etc.

It seems to be conceded that these patents conveyed title only to the ordinary high-water mark along the river.

The different conveyances of the lands covered by the three patents are set out in the stipulation, at pages 227–229 of the record. The Winans claim is founded upon a bond for a deed executed by the present owner, who holds the title under the patents by the mesne conveyances set out. The patents (pp. 232–234) all appear to have been issued under the act of 1820 for the public or private sale of Government lands. (3 Stat., 566; Rev. Stat., secs. 2353 *et seq.*)

The agreement between the State of Washington and S. Farrell for a portion of the shore lands lying between the river and the lands involved in this suit is set out in the record at pages 234–237. This agreement is dated January 28, 1896, six months after the filing of this suit (bill filed July 11, subpœna issued July 31, 1895).

It is also stipulated (Rec., p. 229) that the other contracts of sale of shore lands by the State to Farrell contain the same stipulations as that set out on pages 234–237 of the record; that these contracts call for all the shore lands lying between the patented lands involved in this suit and the low-water mark of the Columbia River; that these contracts were executed in accordance with the laws of the State of Washington; and that all these contracts for the purchase of the shore lands have been entered into since the filing of this suit.

The defendants have acquired the shore land interests under these contracts of purchase from the State.

The first patent was issued in 1866; the second patent in 1869. In 1884 a circular was sent to land officers instructing them to refuse peremptorily all entries and filings attempted to be made by others than Indian occupants upon lands in possession of Indians who have made improvements of any value whatever thereon (Rec., p. 146; the date of Secretary Teller's approval, May 31, *1894*, is evidently an error in the printing). In 1888 (Rec., pp. 230–232) the local land officers were instructed not to allow entries or filings on any lands embracing Indian fisheries in this township

The third patent was issued in 1889.

I say, then, that at all times, in the hands of the original patentees and thence on, there was notice and actual knowledge by reason of the treaty provisions, by reason of the notorious Indian use of this fishery, that private ownership of the land was subject to this

servitude. I say that, beyond question, when the Winans in 1893 gathered up and collected these various tracts and claims which they held under the somewhat peculiar form of a bond for a deed, but not an actual deed, and under assignments of contracts to purchase, they were conclusively charged with knowledge of the situation and knowingly tried the experiment and took their chance of making their enterprise a success, shaking the Indians off and establishing their title as absolute. They are fatally challenged at every point by the known facts and the notorious Indian rights and the duty and endeavor of the Government to protect them. Their position is not that of an innocent and *bona fide* purchaser without notice; their title is covered by a valid right and servitude, and they knew it *ab initio.* The suit on behalf of the Indians against Frank P. Taylor was begun and finished, issuing in a judgment directing that the Indians be permitted to fish, long before the third patent to O. D. Taylor, and long before the purchase by the Winans of the various interests. (Testimony of F. P. Taylor, pp. 164–166.) It sufficiently appears that F. P. Taylor did not give a warranty deed when he sold, because the purchasers knew the condition the property was in and that a suit against him was pending. "They knew that there had been litigation and that the Indians were trying to set up rights." Nobody was deceived, and the adverse claims were fully understood. And the later litigation by the United States against O. D. Taylor was also well known. It is easy to say that if there is any

equity, the equity is due from the United States; it is the United States which has been improvident, but nevertheless an absolute title was given and the United States must compensate. The only equity which can be due is that which rescues the fishery under the principle of specific performance, and this can only be worked out on and over the claim of private title. The opposite contention begs the question.

I confidently submit that the patents never gave an absolute title, and that the fee was always conditional. The treaty gave the right. Congress has never divested the Indians of the right. It is wholly untenable to assert that because the land was improvidently patented under one of the acts for the sale of public lands, the right was divested indirectly by the law of Congress and directly by the executive act. It is altogether unsound to suppose that an executive officer, mistakenly and wrongly issuing a patent without proper reservations, under such circumstances, can by that act devest valid vested rights. The right of taking fish was granted by the law-making power of the nation; in the face of that express grant it can not be taken away by any act of an executive officer.

ARGUMENT.

I.

Previous adjudications on the same controversy, and on similar claims.

This is an old controversy, and was fully adjudicated when Frank Taylor, one of the witnesses for the defense here (rec., p. 157), held title under patent to

part of the land. The case went to the Supreme Court of the Territory, which sustained the Indian claim and remanded the cause for further proceedings. (*United States et al.* v. *Frank Taylor*, 3 Wash. Ty., 88.) The statement there concisely sets forth the respective claims, and the argument on behalf of the Indians strikes the keynote of the present controversy, as follows: That a treaty is part of the supreme law of the land; that when two constructions are possible, one restrictive and the other liberal, the latter is to be preferred; that this rule has a peculiar application in the case of such a treaty as this, because it was made by a powerful and enlightened nation with ignorant and barbarous tribes who occupy toward that nation the anomalous attitude of a high contracting party, and at the same time of a ward. The Indians were not only dependent upon the nation with whom they dealt for the aptness and adequacy of the language of the treaty to protect their reserved rights as well as to cede their country, but even for the interpretation and construction of that language. All reasons combine to give a liberal meaning to the language employed and to prevent the treaty from being construed to the prejudice of the Indians. It was argued that the acts of Congress providing for sale and grant of the public lands could not be viewed as operating to repeal these treaty stipulations; that it is not within the power of the courts or executive officers of the Government to contravene the treaty provisions, and is not within the power of the Government in issuing a patent to deprive these Indians of a

treaty right secured to them. If the right claimed was reserved to the Indians by treaty stipulation, Taylor and his grantors were charged with knowledge and the reservations of the treaty are in effect imported into the patent. The court determined the case under the terms of a stipulation which was similar to the stipulations now before this court, and held that, applying the liberal rule of construction of treaties, the question was whether the significant paragraph in the treaty was a reservation from the force and effect of the cession of the treaty of the rights specified, or should be construed as a specific grant of rights by the United States. The determination was that the Indians in making the treaty intended to grant only such rights as they were to part with rather than to convey all with the understanding that the particular rights were to be reconveyed to them; that the language reserved to the Indians the right to continue to enjoy the ancient fisheries, and did not convey to them all places which were, or which in the future might become, usual and accustomed places of fishing, because that view would make the right to use the shore for the purpose of erecting houses and drying fish a servitude imposed upon all the shore line of the Territory—a sort of floating servitude liable to disturb the possession of any patentee or purchaser, although at the time of purchase his water front might never have been a place used for taking fish. It was also held that the public land acts simply authorized the appropriation by the settler of unappropriated lands, and only author-

ized the extinguishment of the title which the Government holds at the time of appropriation, and if any servitude or easement is impressed upon the land selected, then the settler takes subject thereto.

The controversy came up again in the Federal court (44 Fed. Rep., 2) on a rule to show cause why O. D. Taylor, a successor to the title of Frank Taylor (Rec. herein, pp. 228–229), whose name appears frequently in this record in connection with ousting the Indians and removing their houses when he was in possession, should not be punished for contempt in violating the injunction which the District Court of the Territory under the remand from the Supreme Court finally granted against Frank Taylor. The Circuit Court of the United States held that the case in the Territorial courts was pending when those courts went out of existence, and the case was lawfully transferred to the Federal court under the enabling act of February 22, 1889 (25 Stat., 676); that the jurisdiction of the Federal court included the power to punish a violation of the Territorial court's injunction, and a motion to discharge the rule to show cause was denied. That decision was rendered by Judge Hanford, and therefore it seems that, on the one hand, the Indian claim to these fishing rights has been adjudicated in their favor by the territorial courts, and that adjudication has been sustained by Judge Hanford; and, on the other hand, that in the present case, following his own previous decisions in *United States* v. *Alaska Packers' Association* (79 Fed. Rep., 152), relating to a fishing claim of the Lummi

Indians under a similar treaty, and the *James G. Swan* (50 Fed. Rep., 108), relating to like privileges claimed by the Makah Indians, the Indian claim has been denied altogether, on the ground that they are only on an equal footing with other citizens who have not acquired exclusive proprietary rights; that the operation of fishing wheels, which necessitates exclusive possession, is a part of the defendants' exclusive rights, and that the Indians can not legally demand to interfere with such rights under the terms of the treaty in respect to fishing privileges in waters outside Indian reservations.

In the *Alaska Packers' Association* case it was held that the similar article of that treaty gave the Indians a general equality of rights coequal with citizens, but not exclusive rights at any particular places; that the issuance of ordinary titles to public lands was contemplated by the treaty, and that it is unreasonable to suppose that all public lands adjacent to fishing waters were permanently impressed with an easement in favor of the Indians. In that case it seems that there were no inclosures, and the complaint was that by reason of the fish traps established the Indians were not able to fish so successfully as before; but the court held that, notwithstanding the fish traps, there was still ample room for the Indians to engage in fishing, and that they can do so successfully at all seasons.

The danger suggested by Judge Hanford is fallacious. It may be unreasonable to suppose that all public lands in Washington adjacent to waters where

fish may be taken are permanently impressed with an easement in favor of the Indians. The contention here is no such large and vague thing, but simply that this particular narrow strip of land, extending for a short distance along the Columbia, where fish were taken in fact by the Indians through unnumbered generations probably, where this definite, ancient fishery existed, was impressed with the easement and servitude.

The gist of the Alaska Packers' case is that while the Indians were interfered with by private ownership under patent and State license, they were not absolutely prevented from all approach to and participation in the fishing. In the present case the exclusion is absolute and the distinction between the two cases is manifest. The Indians were not intended to have exclusive rights, but rights in common with citizens, but it was certainly not intended to give them no rights at all by the easy process of saying that neither citizens nor they had any right whatever after a patent was issued. That point is always accentuated in such cases by showing or arguing that white citizens do not claim any such rights and the Indians therefore have none. But the indifference of whites, or their more easy yielding to the exclusive private claim, ought not to prejudice or defeat the Indians. Among citizens in general, outside the limited class who maintain permanent fisheries, river fishing is a temporary occupation or pastime, but with Indians in that northwest country, it was and is the staple dependence and an immemorial and permanent means of livelihood

This dependence of the Indians and their relations to this place were perfectly well known to the Government when the treaty was negotiated and ratified. They were entitled to fish at this usual and accustomed place. It is idle to suggest that they can approach and reach the river at other points and then fish from boats. It is an obvious fact that fishing on the various rapids of the Columbia can only be done from the banks. If it were true that the Indians could reach the river at other points and then pass up or down the stream in boats to these particular fishing places, it would make little difference to them whether these lands were fenced or not; but it is about as impossible to navigate and fish upon the dalles and rapids of the Columbia as the rapids of Niagara.

In the case of the *Swan* there was a proceeding to forfeit a schooner for killing fur seals in the waters of Alaska. The vessel was owned by a Makah Indian, and the defense was that the vessel was especially privileged to engage in sealing in Bering Sea by virtue of the treaty with that tribe, which provided that "the rights of taking fish and of whaling and sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses," etc. The court held that this language only secured to the Indians an equality of rights and privileges in common with all citizens of the United States, and gave no support to a claim for peculiar or superior rights or privileges denied to citizens in general. In

other words, of course, the claim of higher or exclusive Indian rights could not be heard to prevent the forfeiture of a vessel engaged in violating a statute.

II.

General principles and the extent of State power and rights.

Under English law there were three kinds of fisheries. A free fishery, or exclusive right of fishing in a public river, which was a royal franchise; such right to be valid must be very old, because Magna Charta and the later charters directed that rivers fenced should be laid open and forests be disafforested. A several fishery was one vested in or derived from the owner of the soil. Both a free fishery and a several fishery were exclusive rights, in which they differed from a common of piscary. (2 Bl. Com., 39, 40; id., 417 *et seq.*) But it was a general and settled principle of English law that there was a public domain in navigable waters and their beds extending to the usual high-water mark, and that within that limit the right of fishery is common to all, and this principle has been generally recognized in the United States, excepting so far as it has been restrained by positive law or by grant from the State. In this country the presumption is against the existence of an exclusive fishery. (*Weston* v. *Sampson*, 8 Cush., 346, 352; *Carson* v. *Blazer*, 2 Binn., 475; *Yard* v. *Carman*, 2 Pen. (N. J.), 681, 686; *Melvin* v. *Whiting*, 7 Pick., 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533.)

The riparian owners on principal rivers of a State have not an exclusive right to fish, but the right is vested in the State and open to all. (*Carson* v. *Blazer, ut sup.; Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R., 71.) The rule is otherwise in non-navigable rivers, the right of the owner of adjoining lands extending to the middle of a stream, but under such restraints as the government may impose—the right of regulating the subject, whether in navigable or other streams, residing in the State. (*Waters* v. *Lilley*, 4 Pick., 145; *Commonwealth* v. *Chapin*, 5 Pick., 199.)

Two views of the subject appear thus to be drawn from the original sources, viz, that the right of fishery is a common right, belonging to the public; that it is an exclusive right belonging to the owner of the soil and incident to the dominion of the soil, whether public or private. In either aspect the Indian claim here is logical and rational, sustained either as a right held in common with citizens, or as a right immemorially incident to their own possession and occupation, which was recognized or reserved by the Government in its public dominion over the soil and its title as owner.

The States hold the absolute right to all navigable waters within their territorial limits, including the soil under them and the fisheries therein (*Smith* v. *Maryland*, 18 How., 71; *Manchester* v. *Massachusetts*, 139 U. S., 240; *Shively* v. *Bowlby*, 152 U. S., 1), subject only to the rights which the Constitution provides shall be exercised by the General Government in the regulation of commerce (*Martin* v. *Waddell*, 16 Pet., 367).

In *McCready* v. *Virginia* (94 U. S., 391) Chief Justice Waite, delivering the opinion of the court, said:

> Each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. * * * In like manner, the States own the tide waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people and the ownership is that of the people in their united sovereignty. * * * The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. * * * It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

In *Manchester* v. *Massachussetts* the court suggested the question whether there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, but expressed no opinion upon it, hold-

ing that the preservation of fish is a subject which a State may well be permitted to regulate within its territory in the absence of any regulation of the United States. (See also *Holyoke Co.* v. *Lyman*, 15 Wall., 500.)

It has been held that the public have the right to take fish in navigable waters below high-water mark, though upon soil belonging to an individual (*Bickel* v. *Polk*, 5 Harr. (Del.), 325). The ownership of submerged lands is not a mere easement, but a title in fee, subject, however, to the public rights of navigation and fishery (*Shively* v. *Bowlby*, 152 U. S., 1, 19, and *passim*). A grant of the land under navigable water does not impair the common right of fishing therein (*Hogg* v. *Beerman*, 41 Ohio St., 81), and as the owner of lands adjoining public waters has no exclusive right of fishing there, he can not in a grant of such lands reserve the right of fishing in the adjoining waters disconnected with the shore (*Sloan* v. *Biemiller*, 34 Ohio St., 492).

The State may grant to individuals the exclusive right of fishing in any of the navigable waters of the State (*McCready* v. *Virginia*, 94 U. S., 391; *Lowndes* v. *Huntington*, 153 U. S., 1) provided vested rights are not infringed thereby (*Hathaway* v. *Thomas*, 16 Gray, 290). The public right of fishing in navigable waters extends to high-water mark (*Shively* v. *Bowlby*, *ut sup.*).

In *Eisenbach* v. *Hatfield* (2 Wash., 236) the contention was that whatever may be the title of the State to the soil under tide water, a riparian owner by virtue of his contiguity to the water has certain vested rights of property beyond those of the general public peculiar

to himself, including a right to wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water, and a right to further accretions. The court held, under rules laid down by this court, that tidal lands belong to the State, which has full power to dispose of them, subject only to the restrictions imposed by the constitutions of the United States and the State, and no individual can claim any easement in them or impose any servitude upon the tide waters of the State without the consent of the legislature; that a riparian proprietor on the shore of the sea or its arms has no rights as against the State or its grantees to extend wharves in front of his land below high-water mark. There was a vigorous dissent based upon a territorial statute which it was contended had not been repealed by the constitution or laws of the State—in which the authorities were distinguished and the opposing principles invoked for the view that the natural riparian rights and the expenditures made in reliance upon them ought not to yield to the idea of legal title and sovereign dominion. I cite this case to show how a State claim of right and control over the shore and contiguous waters has been construed in this particular State.

Now, amid all the rules and authorities respecting Federal and State control, tide lands and navigable rivers, fisheries, shore access and riparian rights, one fact stands out clearly and sharply in this controversy. The State entered upon its domain and dominion subject to all valid rights granted or reserved while the Federal

Government was administering the Territorial condition, exercising full sovereignty and acquiring and disposing of the ownership of public lands and public rights in its dealings with the Indians and others during that period.

The organic act of 1853 (10 Stat., 172), separating Washington from Oregon and erecting it into a Territory, recognized and preserved as usual the authority of the General Government to regulate in their absolute sovereign competence the Indians, their lands, property or other rights, by treaty, law, or otherwise. The act of 1889 (25 Stat., 676, par. 3, sec. 4), admitting Washington with other States into the Union, contained a declaration on behalf of the inhabitants of those States, disclaiming all rights in unappropriated public lands and Indian lands which remained under the absolute jurisdiction and control of Congress. This provision was expressly accepted by the constitution of Washington, and therefore, since within the letter and spirit of those enactments, the rights now in question, if validly granted or reserved, are beyond the State control, the provision of the State constitution asserting the ownership of the beds and shores of navigable waters must necessarily be taken to recognize an exception of rights carved out and disposed of before the State dominion and jurisdiction attached. Indeed, the proviso of that article of the State constitution permitting any claim of vested rights to be asserted in the courts of the State recognized this principle, and in accordance with that proviso the right here

involved was adjudicated by those courts in favor of the Indians. This principle was fully recognized in *Shively* v. *Bowlby*, which held that while new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions, and the title and rights of riparian or littoral proprietors therefore are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution, nevertheless the United States, while they hold country as a territory, have all the powers both of national and municipal government, and may grant for appropriate purposes titles or rights in the soil below highwater mark of tide waters. This doctrine fully covers the grant or reservation to the Indians of their fishery rights, assured by the United States under treaty stipulations soon after that region passed from the Indian country status into the Territorial condition, and long before it became a State. Therefore, any State contracts for sale of shore lands or State licenses for the exercise of fishing rights are subject, on fundamental principles, to all prior rights vested and established under the authority of the United States. The State is founded on acceptance of the Federal Constitution and authority and on recognition of rights derived therefrom. Therefore, to construe the State shore grant as altogether dispossessing the Indians of this vested right would deprive them of property without compensation and without due process of law.

III.

The patents and titles drawn from them are subject to this servitude.

The Indians' claim is not merely meritorious and equitable; it is an immemorial right of a nature and duration which stood for the most perfect and impregnable title in the English notions of a ripened prescription. It is not like such a claim as was advanced on behalf of the Mission Indians (*Barker* v. *Harvey*, 181 U. S., 481), strong in its appeal of equity, but revealing a failure to take the necessary steps to perfect the right under the law, which caused it to yield to the white man's patents. Here this historical right, peculiar to Indians so located and peculiarly valuable to them, was recognized and assured by treaty, and beyond doubt this recognition and assurance were in large part the reason why the United States was enabled to extinguish on behalf of white settlers the Indian title to that large body of land in the Cascade country. The terms of the treaty, as I have pointed out, show, not a loose and vague equity, but a definite granted or reserved right. If it might have been doubtful whether this or that other point on the river, to which the Indians resorted for fishing, was a usual and accustomed place, there can be no manner of doubt that this fishery along the Winans property was such a place, because it was the most famous fishery on the Columbia River. The treaty speaks in terms of cession, grant, and conveyance of a definite Indian title to lands, and the definite items of consideration because of which the grant was

made are set forth as in any private contract of sale and conveyance. The same principle of bargain and sale, grant and payment, is manifested by the later agreement under which the Indians retroceded or conveyed the particular reserved fishery at Wenatshapam. Here is not an equity which the United States, if it improvidently granted, should meet and respond to, but a plain condition, easement, or servitude under which the defendants took over this property, staring them in the face in many ways, as I have pointed out herein, through the years when they were familiar with this locality and were making up their minds to experiment with the situation and take the chances of maintaining the exclusion of the Indians.

A mistake in the general and practical sense was manifestly made when the executive officers of the Government improvidently issued the patents here without due and express reservation of the Indian rights, although, of course, the object of our argument in this brief, made with confidence, is to show that such reservation was not necessary to protect the Indians. The ground of equitable intervention here, however, is not technically that of mistake or fraud; we are not endeavoring, contrary to the acts of limitation on suits to vacate and annul patents (viz, as to patents issued during the period here in question, the act of March 3, 1891, 26 Stat., 1093) to set aside and cancel a patent on the ground of mistake or fraud. What we are seeking to do is simply this: We are asking the court to recognize the righteousness and

justice of the Indian claim, to declare and establish by its equity powers, and with due observance of the notion of specific performance, the trust for the Indians which at all times has been an essential ingredient of private title to these lands. The trust is not only an obligation in the form of equity due from the Government as negotiator of the treaty and guardian, but is a condition and limitation under which the private rights were taken. The private rights and claims, in other words, are valid just so far as they are not inconsistent with and exclusive of the Indian rights and claims, but no further.

The principle that a patent does not invariably and inevitably convey an absolute title beyond all inquiry and free of every condition is fully sustained by the authorities.

Ledyard v. *Trezevant* (160 U. S., 452) was an action brought to restrain the board of engineers from constructing a public levee through complainant's plantation. It appeared that a doctrine, said to have been derived from the Code Napoleon, existed in the Territory of Louisiana before its purchase by the United States, "that lands abutting on the rivers and bayous were subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken in pursuance of law without compensation." This servitude was explicitly asserted in the Civil Code of Louisiana, and continues to the present time. The contention was that complainant owned the land in fee through title derived by patent from

the United States, without reservation, and that no condition attached to his ownership, whatever may have been the conditions of the ancient grants; that the servitude under which lands were held, whose titles were derived by grant from Spain or France or from the State, did not attach to lands whose titles were derived from the United States. The court took the contrary view, holding that the property, although patented by the United States, was held subject to the operation of the State law respecting construction of public levees, and could not pass to a purchaser free of that reservation. In that case the court cited, among other authorities, *Ruch* v. *New Orleans*, 43 La. Ann., 275; *Barney* v. *Keokuk*, 94 U. S., 324; *Packer* v. *Bird*, 137 U. S., 661; *Hardin* v. *Jordan*, 140 U. S., 372; *Shively* v. *Bowlby*, 152 U. S., 1.

The present case illustrates that principle precisely, but it is even stronger. It can not well be doubted that the Indian claim to the most scrupulous construction and fulfillment of the Government's obligations to them is a call upon the highest standards of national honor. There is no stronger illustration of national *noblesse oblige*. An obligation like the present one, for fulfilling which the faith of the Government is directly pledged, is a much more manifest and impressive servitude on later rights than a relic in existing State law of a rule of the code of civil law before the State was in existence. Further, here one of the patents contained on its face a reservation which in spirit and intent embraced the Indian right, and respecting all of the patents as well as the State shore land title there were

warnings and notices all through from the original fact of the great value of the fishery as the Indians' ancient resort through the various litigations to test the question and the notices and instructions from the Interior Department that entries and filings by white people would not be permitted. The Government's engagement was to give the Indians this fishery, or rather to preserve it for them. The Government could not give them as good a fishery—perhaps could not give them any now—and is not liable in law or morals for that in any case. The defendants can not say, "If there is any equity, it is not due from us; let the Government make it good." The Government is bound to achieve, if possible, a specific performance of its treaty agreement, and the defendants always knew this and took their property subject to the liability and equity to respond in such a proceeding as this to the demands of the valid servitude.

I submit that the decree below should be reversed and the cause remanded for such further proceedings as may be necessary and appropriate. I suppose that the question of framing a proper decree would be remanded to the court below either without instruction from this court beyond the judgment of reversal, or else with some direction as to its terms. If to make the temporary restraining order below as modified a permanent injunction in the case would not meet its necessities, then it will be necessary to consider what justice and equity fairly require. It seems quite clear

that the fish wheels are very destructive of the fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone. One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dip nets for the longest possible time without being driven back up the bank or bluff by rising water. There were other favorite spots where they ran trestles out over the water for the same purpose. In any case, if it is true that they can fish to advantage elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. On the other hand, they can not claim to have an exclusive right, and, enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing. If it is not fair under the present conditions that they should enjoy without restriction their ancient

right of camping and curing fish in temporary houses on the defendants' property, a decree can indicate the proper limitation. It may be that there ought to be some composition of that right, or some arrangement by the defendants or the United States, or both. There appear to be Indian lands in the vicinity, as marked on the plat, which, if not in private Indian ownership, may enable the executive branch of the Government to accomplish such an arrangement or composition. It appears clear, as noted below, that the privilege of pasturage, etc., is confined to open and unclaimed land, and here again it would seem to be the duty of the executive Government to facilitate the enjoyment of the Indians of those rights on the nearest and most convenient available land. By some proper route following the old trails, and at proper hours, with due protection for the defendants' buildings, stock, and crops, a way of easy access, free ingress and egress to and from the fishing grounds, ought to be open to the Indians and be kept open.

The court will note that the privilege of hunting, gathering roots and berries and pasturing horses and cattle, is expressed to be "upon open and unclaimed land." The right to erect temporary buildings for curing purposes is distinct and separate and manifestly relates to the particular place; that is to say, the right of temporary occupancy at usual and accustomed places attached to the bordering lands,—the strip along the river at such points which was closely adjacent or contiguous.

It seems proper thus to suggest what principles and terms may pertinently and rightly inform a decree in favor of the appellants, which this court may see fit to make or direct the court below to make. And I have the honor respectfully to submit that the decree below should be reversed, and the cause remanded for the entry and enforcement of the proper decree.

HENRY M. HOYT,
Solicitor-General.

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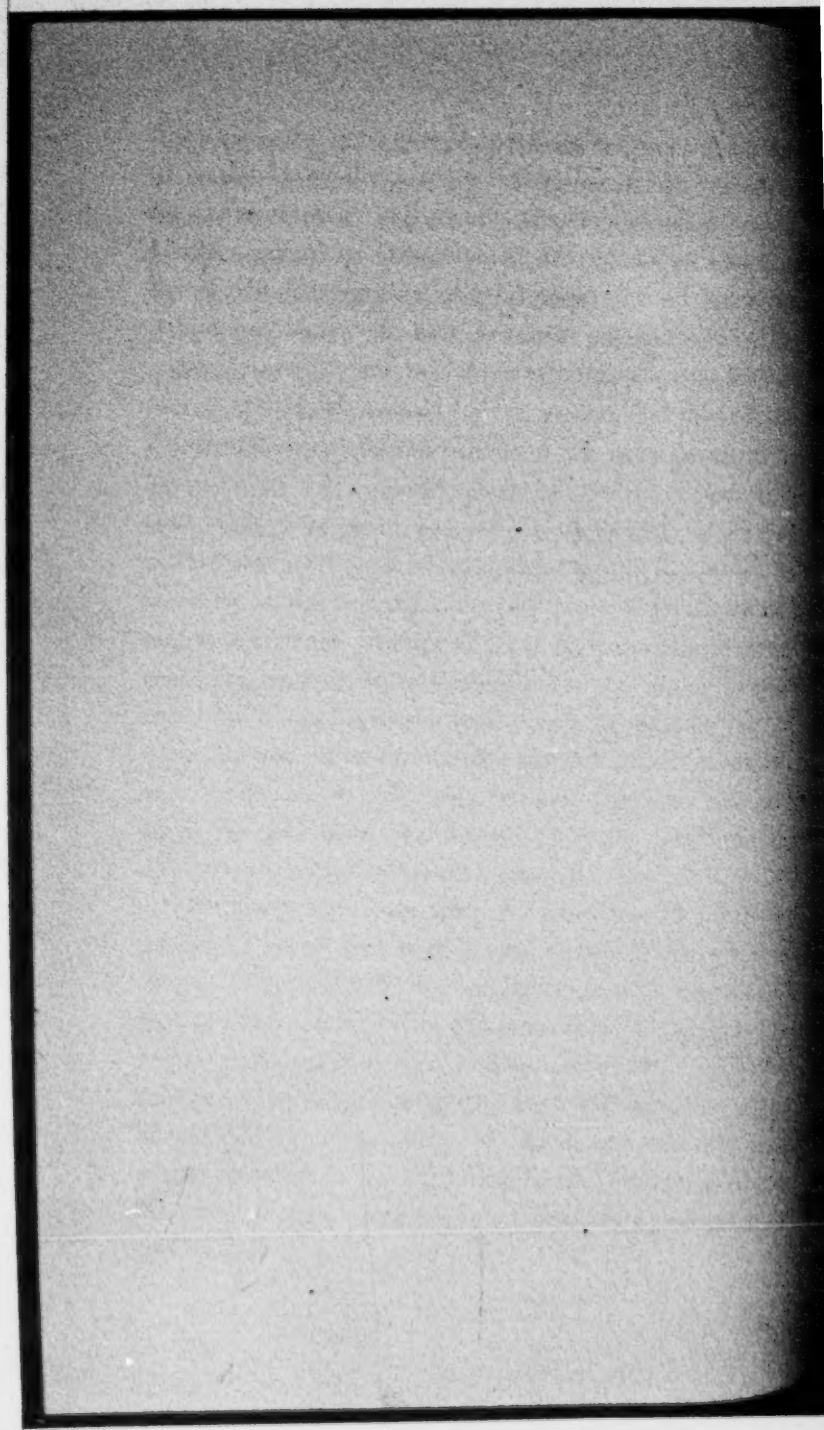

Supreme Court of the United States

OCTOBER TERM 1904

No. 180

THE UNITED STATES, THOMAS SIMPSON, AND WHITE SWAN,

Appellants.

vs.

LINEAS WINANS AND AUDUBON WINANS, partners doing business under the firm name of WINANS BROTHERS,

Respondents.

STATEMENT OF THE CASE.

This is a suit to enjoin the defendants from obstructing certain Indians of the Yakima Nation in the State of Washington in the enjoyment of alleged rights and privileges claimed by them under a treaty between said tribe or nation and the United States government, in force since 1859. The provisions of said treaty material to this suit are these:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. * * *

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid con-

federated tribes and bands of Indians the tract of land included within the following boundaries: * * * * * *

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time and not included in the reservation above named. * * *

"Article III. And provided that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highways is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. * * * * *

"Article X. And provided, that there is also reserved and set apart from the land ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fisheries,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." (12 U. S. Stat. 951.)

Under this treaty said Indians claim an unlimited right to take fish at the usual and customary fishing places on the Columbia River that were in use both before, at, and since said treaty; and also claim the right to erect temporary buildings for drying and curing fish, and for the habitation of such Indians during each fishing season, to the same extent as if such rights and privileges were especially conferred and granted by the sovereign power; and also, that the defendants' claim of exclusive ownership and control of the lands bordering on the Columbia River at such fishing places, under United States patents, and to the shore lands abutting thereon, between high and low-water mark, by grant from the State of Washington, and their claim of the right to operate fish wheels thereat, under license from the state, must be subordinate to such treaty rights and privileges.

Respondents contend that said treaty provisions conferred upon the Indians, as to such lands and fishing places, merely such rights and privileges as the citizens of the Territory enjoyed, and such as the citizens of the state have enjoyed since its admission into the Union, and that such rights conferred are subject (1), to the paramount authority and power of Congress; (2) to the laws relating to the disposal of public lands, and (3) to the admission of the State of Washington into the Union on an equality with all other states, which negatives any question of its ultimate power of disposition over its lands between high and low-water mark or of licensing and controlling the manner of catching fish in its navigable streams; they also claim that said treaty provisions were in general terms, applicable to no particular places, and not

sufficiently certain to confer an easement in any particular land or water; and inasmuch as such rights and privileges were to be exercised "in common with the white citizens," whose right to fish are entirely subject to state regulation, those claimed by the Indians could have no greater extent.

The defendants demurred to the bill of complaint on the grounds: (1) that the bill does not make out or state such a case as to entitle complainants to any relief in equity; (2) that the court has no jurisdiction of the subject-matter of the bill nor of the persons of the defendants.

The demurrer was overruled, the court holding that the appearance of the defendants gave a jurisdiction over their persons, and that it had jurisdiction of the subject-matter set out; and also that said treaty of 1859 gave the Indians common rights of fishing, etc., with the citizens of the Territory and the State in the waters of the Columbia River, which should be protected from invasion by the defendants; the court further held, however, that the right of the Indians to erect temporary buildings on any particular spot of ground ceased when the title to that land was transferred from the United States by patent and became vested as private property.

The demurrer having been thus overruled the defendants answered the bill of complaint and upon the issues so joined, a reference to a special examiner was made, and upon the final hearing a decree was rendered upon the evidence produced by the parties, and upon certain stipulations of fact.

ISSUES OF FACT.

Upon the pleadings and the stipulations, the following summary of the issues of fact may be given:

Appellants contend that defendants, Winans Bros., have by threats, intimidation, and force deprived the Yakima Indians, and particularly the plaintiffs Simpson and White Swan, of their said treaty rights and privileges in this: they have driven the Indians away from their said usual and accustomed fishing places; refused to allow them to come thereto and catch fish; torn down and destroyed their temporary houses erected by them on lands near said fishing places for drying and curing fish, and refused to allow them to rebuild; have by threats, force, and actual assault, driven the Indians away from the river and refused to allow them to fish in said places in common with defendants and other citizens, or at all; that defendants have constructed fish wheels in the usual runways of the fish, which catch all the fish and prevent the Indians from taking any; refused to give the Indians free ingress and egress to and from the fishing places in the Columbia River and over their patented lands, or to erect houses thereon for curing fish.

Defendants and appellees claim that the lands were patented to their predecessors in title and that soon after the patenting of said lands, the Indians were interrupted in attempting to exercise said common rights and privileges as to said lands; that since that time the Indians have frequently trespassed upon the lands to the great injury of the defendants, and still continue so to do; that defendants and their grantors

have denied that the Indians have rights under the treaty to fish upon said lands, erect houses or huts thereon for curing and drying fish, or go to the bank of the river to fish and return therefrom, although they have at times permitted them to fish upon said lands; that they have refused to permit them to trespass upon said lands in taking fish; that defendants have placed no obstructions whatever to prevent the Indians from fishing in the river, and have not refused to permit them or prevented them from so doing. That there are many places for many miles above said patented lands and for many miles below, some of which are on vacant public lands, where the Indians can still fish; that the fish wheels of which the appellants complain are all duly licensed by the State of Washington, and are located entirely on said lands of defendant, and do not prevent or exclude said Indians from taking fish at their usual or customary fishing places or catching fish in the runways; that defendants haxe excluded the Indians from such patented lands only where citizens of the State of Washington have no right to go; that in addition to controlling and possessing the lands described in the complaint under grant from patentees of the United States, the defendants have, since the beginning of this suit, acquired the possession and control of the lands between such patented lands and low-water mark of the river from the State of Washington.

The testimony having been taken and reported to the court, such proceedings were had that, on February 23, 1903, the court filed its memorandum decision on the merits. The court said (Abstract, p. 38.):

"After the ruling on the demurrer, the only issue left for determination in this case is as to whether the defendants have interfered, or threatened to interfere, with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands to which a perfect absolute title has been acquired from the United States government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise, the defendants have not molested the Indians, nor threatened to do so. The Indians are at the present time on an equal footing with citizens of the United States who have not exclusive proprietary rights, and this, it seems to me, is all they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The bill of exceptions (Trans. p. 246) recites that:

"Upon the final hearing and argument of this suit at Seattle, on the 20th day of May, 1903, the following proceedings were had:

"This cause having come on at that time for hearing and final argument upon the merits, the plaintiffs appearing

by Edward E. Cushman, Esq., Assistant United States Attorney for the District of Washington, and the defendants by F. P. Mays, Esq., their attorney, thereupon the defendants offered in evidence in their behalf four certain fish licenses, duly issued and signed by James Crawford, Fish Commissioner for the State of Washington, and numbered respectively licenses A, B, C and D, which said licenses it was mutually agreed by the parties hereto were duly issued by the State of Washington on the dates they respectively bear, to the parties named therein, and that such licenses were held by the defendants, and that the defendants were fishing under them during the time covered by them and at the times of fishing complained of in the plaintiffs' bill of complaint."

Pages 246, 247, and 248 of Transcript set out the fish licenses so issued, each for the year ending March 31, 1896.

"Whereupon, it was agreed that defendants' answer should be deemed amended so as to conform to the proofs and so as to allege that the defendants at the time complained of were duly licensed by the State of Washington to maintain and operate all fish wheels complained of at the points mentioned and where they were located on the land in question; and also that since the commencement of this suit, the State of Washington has sold all the shore lands upon the Columbia River fronting on the premises in question, between said river and the lands patented by the United States to its grantors, and that said defendants had succeeded to and held the state's interest in and to said shore lands where said fish wheels are located. * * * * * Thereupon, the said licenses were received in evidence, marked as aforesaid, and it was ordered

that the said answer * * * be deemed and considered amended as above stated." (Trans. p. 248).

At the close of the defendants' testimony, it was stipulated between the parties that the patented lands in controversy are now owned by Tyler Woodward, of Portland, Oregon, by mesne conveyance from persons who received patents from the government; that said lands are now in the possession of the defendants Winans Bros. under a bond for a deed from said Woodward. (Trans. pp. 227-9, and map, Pltffs. Exhibit A, p. 240).

It was also stipulated that since the beginning of this suit, the defendants have acquired contracts of purchase from the state for the sale of shore lands lying between the patented lands described in the complaint and answer and low-water mark of the Columbia River, and now occupy the same, and that said contracts of sale were duly executed under the laws of Washington for the sale of its shore lands (Trans. p. 229).

Final decree was entered, dismissing the bill May 28, 1903 (Abstract, p. 39), from which the United States appeals, assigning the following errors (Abstract, p. 250):

1. That the Court erred in its order of November 19, 1895, modifying the injunction order theretofore issued (See Abst. p. 20).

2. That the Court further erred in making its final decree herein on May 28, 1903.

3. That the Court erred in its finding and decision contained in said decree that there was no equity in complainants' cause, and adjudging a decree that said cause be dismissed.

4. The Court further erred in its ruling and decision on demurrer, made and filed March 31, 1896.

A temporary injunction was issued on the filing of the bill of complaint, July 11, 1895 (Abstract, p. 15), and this was, pursuant to stipulation, modified on November 19, 1895 (Abstract, p. 20). The only change made by the order of November 19, 1895, modifying the previous injunction order, was that it gave defendants, in common with complainants and the Yakima Indians, the right to fish at said usual and customary places. The first order restrained the defendants from operating their fish wheels; the modified order giving them the right was based upon stipulation signed by William H. Brinker, United States Attorney, and F. P. Mays, solicitor for defendants. As the order was properly made, on the request of all parties, this point cannot be urged by appellants. Even if objectionable, it does not affect the merits. This first assignment of error, therefore, will not be further discussed in this brief.

The other assignments raise substantially the same questions, and will be considered together, as challenging the legal conclusion reached by the Circuit Court, as set out in the opinion hereinbefore quoted (Abstract, p. 38).

THE TESTIMONY.

The testimony is not confined to the single point considered by the Court below in its memorandum decision, but covers all the issues raised by the pleadings. To simplify

respondents' brief discussion of the same, we desire to state that certain incontrovertible facts appear from the testimony:

1. That the Indians of the Yakima Nation, both before and after the said treaty of 1859, were used and accustomed to catch salmon in the Columbia River at the places called by them Wisham and See-Wee-Pam, located at and upon the lands now in the possession and control of the defendants, contained in sections 19 and 30, township 2 north, range 14 east, and section 25, township 2 north, range 13 east.

J. H. Wood, Plffs. 118.

White Swan, Plffs. 52.

Frank P. Taylor, Defts. 158-159.

2. That since the said treaty of 1859, the Indians never claimed an exclusive right to the fishery at said places, but only the right to fish in common with the white citizens.

Wm. Speedies, Pltffs. pp. 106-107-108.

Martin Speedies, Plffts. pp. 108-109.

3. That such fishing places at said fishery were not stationary, but were changeable, depending upon the stage of the water; that the Indians, when engaged in catching fish either with spears or their primitive nets, were compelled to move their stands or stages back with the rise or down with the fall of the waters; that in places the high water extended from 100 to 200 yards from the mark of low water.

Martineau, Plffs. 130.

Whealdon, Defts. p. 190.

L. Winans, p. 201.

Charley Dick, Plffs. p. 57-58.

Thos. Simpson, Plffs. p. 49-50.

Spencer, Plffs. p. 78.

4. That the lands in controversy were patented by the United States government on the following dates:

Lot 5, section 19; lots 1, 2, and 3, section 30, township 2 north, range 14 east, patented to William Taylor. Patent received at land office January 12, 1870.

Lots 4 and 5 of said section 30 were purchased by William Smith; cash entry, August 30, 1864.

Lots 1, 2 and 3, section 25, township 2 north, range 13 east, patented to O. D. Taylor, May 10, 1889.

J. J. O'Kane, Plffs. pp. 142-143.

The date of the erection of the first fencing, and closing of the Indian trails to the river, is left uncertain, but all witnesses agree that during the period the said lands were owned and controlled by O. D. Taylor and Frank Taylor, the right to the exclusive control by the grantees of the United States over the said lands was asserted.

Whealdon, Defts. 189.

F. P. Taylor, Defts. 159.

Sam Tan-a-Washa, Plffs. 80.

White Swan, Plffs. p. 53.

Yow Yowan, Plffs. p. 64.

5. That in 1896, the defendants completed the fence previously built on said patented lands, extending it to the river, and that such fence is now continuous (except where the rim rock near the lower part constitutes part of it), from the upper end of the big eddy (see map on p. 240 of Trans.)

to the upper end of the rapids, thus completely cutting off access by either whites or Indians to the fisheries on said patented lands.

Martineau, Plffs. p. 126.

Charley Dick, Plffs. pp. 55-6.

Thomas Simpson, Plffs. p. 49.

Bill Se-Hi-Sam, Plffs. p. 88, et al.

There is no evidence to show that any fence of defendants or their predecessors was built upon the state or shore land prior to its disposal by the State of Washington, in June, 1896, or that at those precise points there was any shore land. The fence on defendants' lands does not run to the lower wheel. A little below the line between sections 30 and 25, a bluff of rim rock forms the fence to the lower wheel (Audubon Winans, Trans. p. 213). From the Indian village at Wisham, they can go direct to the river, but defendants' land is fenced so that they cannot cross lot 5, section 19, to do so. (Audubon Winans, p. 212.) There never has been any enclosure so as to prevent the Indians reaching the river on the east from the north end of the village (Audubon Winans, p. 213).

That until 1895, and according to the defendants, August, 1896, when the fence was completed, the grantees of the United States, and those claiming patented lands under them, allowed the Indians to fish in the said river from the said patented land, and to go over and across the same for such purpose. This privilege, however, was not granted as lawfully due, but was merely a permission, conditioned upon the Indians not otherwise trespassing upon the lands or interfering with defendants' fish wheels or with the employes engaged in catch-

ing fish in the spaces between the several wheels (Whealdon, Defts. p. 191; Linneus Winans, Trans. p. 202, 206.)

7. That neither the defendants, nor their predecessors, have obstructed, hindered, or prevented the Indians from fishing in the river with boats or otherwise, but that the swift and dangerous current along the lands in controversy renders such form of fishing impossible.

Bill Charley, Plffs. p. 97.

8. That there are many other fishing points along the said river, both above and below Wisham and See-Wee-Pam, to which the Indians and white citizens still have access, principally at Cascades, White Salmon, and Skin (a little below Celilo, on the Washington side), with minor fishing places between them.

Thomas Simpson, Plffs. 48, 49.

Frank P. Taylor, Defts. 152, 153.

Seufert, Defts. 170, 172, 173.

9. That it is only since 1896 that the defendants have ceased to permit the Indians to go on said patented lands and notified them to refrain from trespassing. That prior to 1896, some Indians were occasionally ordered off and some were permitted to fish upon condition of orderly conduct and refraining from acts of trespass (Whealdon, Defts. p. 191; Linneus Winans, Defts. p. 202).

10. That the Indian houses, huts, or storehouses on the said patented lands at See-Wee-Pam were torn down as the result of trespass proceedings brought by O. D. Taylor, one of the defendants' predecessors, with which acts defendants have nothing to do (Whealdon, Defts. p. 189); that the

houses in the Indian village at Wisham still stand and are not upon the said patented lands (Yow Yowan, Plffs. 64, 65); and there is no testimony that defendants have ever in any way interfered with the Indians pasturing their horses, erecting their houses, or with their conduct in any way on the lands outside of said patented lands, and have erected no fences thereupon.

11. That defendants claimed the right to exclude whites as well as Indians from said patented lands and fisheries two and even four years before the taking of testimony which was in 1897 (William Speedies, pp. 106-8; Martin Speedies, pp. 108-9).

12. The principal food of the Indians in early times was fish, roots, and berries, with occasional deer (Martineau, Plffs. 125; T-Wash-Pam, Plffs. 104-106.) The reservation Indians at the present time engage in farming and sometimes bring flour from Yakima to the fisheries to exchange for fish caught by the Indians there (Linneus Winans, Defts. 204, 206.) The Indians at the fisheries claim that they, as members of the Wisham tribe, are entitled to fish at that fishery, and for that reason refrain from going to the fishery at Skin, which they say belongs to another tribe of Indians (Sam Tan-a-Washa, Plffs. 82.) All of these fisheries, however, are properly included within the meaning of the treaty stipulation in controversy. It appears from the evidence that the Indians resident at the fisheries, many of whom own lands near the river, are, according to the testimony of Mr. Seufert, greater "monopolists" than the whites (Seufert, Defts. p. 173).

13. The current of the river past the fishing places on said patented lands is very swift; at the place where the old Indian village was at See-Wee-Pam not to exceed 200 feet wide. At other places, it is likewise swift, swirling, and so dangerous that fishing cannot be conducted from boats and that salmon, in traveling toward the spawning grounds, hug the shore, the current of water near it constituting the fishing station. The fish wheels can only be built at places where there is a suitable, shelving bank for support (F. A. Seufert, Defts. 171), and their gear is so adjusted that they rise or fall with the rise or fall of the waters (Audubon Winans, Defts. 214). At times of very high water, the access to the wheels is rendered impossible, and the shore line is inland 100 yards or 200 yards therefrom; at very low water the wheels are out of the water entirely, they being built with a view to fishing at medium stages. The fisheries are from one-half to three-quarters of a mile apart; at Wisham they overflow at high water. They do not overflow at See-Wee-Pam save at extreme high water. At ordinary high water at See-Wee-Pam the fishing is better than at low water; the Indians fished there when the water came up (Test. Charley Dick, Trans. p. 57.) Wisham was the low water fishery; See-Wee-Pam the high water fishery (Charley Dick, p. 58). At some places the shore recedes from the rock 100 yards or so; at other places it is perpendicular. When the water is high, it extends back over the shore land in some places, in others, not (W. D. Gilmore, Defts. p. 195; Whealdon, Defts. p. 190). At the maximum height of the water, the Indians could not get to any of the wheels (Linneus Winans, p. 201).

14. That salmon die after reaching the spawning grounds, having taken no food since leaving still water and being bruised by stones and attacked by parasites and disease while thus weakened. The steelhead (trout), however, returns to the sea after spawning (H. D. McGuire, Defts. 219, 220).

16. That the wheels do not stop the running of the fish near the shore nor catch all of them. That there remains good net fishing between the wheels at all stages of the water, and spear fishing is possible at low water. That prior to 1896, both defendants' employes and the Indians so fished at the places between the wheels (Linneus Winans, Defts. p. 202; Charley Dick, Plffs, pp. 57-9; Martin Speedies, Plffs. 80; Louis T. Barin, Defts. p. 224).

17. The defendants' four fish wheels are located upon the shore land so granted by the state, and are situated as follows:

1. The scow wheel at the extreme upper end of the rapids, at the easterly point of lot 5, section 19, township 2 north, range 14 east.

2. From one-half to three-quarters of a mile southwest of the scow wheel is the first stationary wheel, where lots 2, 3, and 4, section 30, corner on the river.

3. There is another stationary wheel a quarter of a mile southwest, at the lower corner of lot 5, section 30, township 2 north, range 14 east.

4. The last stationary wheel, referred to in the testimony as the "lower wheel," is still another quarter of a mile down stream, to the southwest, and is located at lot 1, section 25, township 2 north, range 13 east.

Linneus Winans, Defts. p. 200.

Map, p. 240, Transcript.

Winans Brothers built the fish wheels about 1889, at a cost of some $15,000.00.

Linneus Winans, Defts., p. 199, 200.

Audubon Winans, Defts. p. 208.

Thomas Simpson, Plffs. p. 48.

All of these wheels, during the times complained of, were operated under license from the state (Trans. p. 246), and the contracts for the sale of the said shore land were executed pursuant to the laws of Washington, authorizing the sai thereof (Trans. p. 229, 248).

18. That in early times and before the establishment of the fish wheels, the Indians lived at said fisheries in greater numbers than at present. They at times congregated there to the number of several hundred and engaged in feasting, fishing and horse racing. Of recent years those living on the reservation have come in much less number and there are but few who live near the fisheries continuously.

Martineau, Plffs. 125.

Wood, Plffs. 118.

19. That 80 per cent of the salmon run is caught the first 50 miles up the Columbia River; that over one-half of the salmon catch of the upper river is caught by the fish wheels; that the fish wheels probably catch 5 per cent of the net catch of the river during a given season (Hollister D. McGuire, Defts. p. 220. Mr. McGuire was at that time the fish commissioner of the State of Oregon).

20. The fish wheel is a proper method of catching salmon

and is no more detrimental to the salmon industry than any other appliances which would catch an equal number of fish (McGuire, Defts. 221).

CONFLICTING TESTIMONY.

As each side endeavored to elicit all possible information, the evidence presents little conflict on material matters. A number of old Indians (Bill Charley, p. 91; White Swan, p. 51; Moses Strong, 60, 61; White Salmon Charley, 72) testified as to their understanding of the treaty as originally made in 1855 between the Yakimas and Governor Stevens and General Palmer, representing the government. As the evidence was taken subject to all proper legal objections (Trans. p. 44), respondents now urge that this testimony was wholly incompetent, as tending to vary the plain stipulations of the treaty, and hence cannot be considered by this court.

Apart from the sidelight it throws on the case, testimony as to the habits of the salmon, its importance as an Indian food, the number of Indians now resorting to the fisheries, and the availability of the other fisheries on the Columbia, has but little significance.

There is practically no controversy except over the effect of fish wheels in destroying net and spear fishing between and above them. It may be conceded that the testimony shows—indeed, it is self-evident—that every fish caught by a wheel diminishes the chances of net fishing, and that every fish caught by a net lessens the success of wheel fishing. But

respondents contend that net fishing, both between and above the wheels, has not been destroyed by them (Linneus Winans, Defts. p. 202, Trans.) Until 1896 the Indians were allowed to fish above the lower wheels (Charley Dick, Plffs. pp. 57-9; Martin Speedies, Plffs. p. 112; Sam Tan-a-Washa, Plffs. p. 80; Louis T. Barin, Defts. p. 224; Whealdon, Defts. p. 191; Linneus Winans, Defts. p. 202).

The wheels do not destroy the fishing places (Frank P. Taylor, Defts. p. 160-1); nor the fishing (L. Winans, Defts. p. 202; F. A. Seufert, Defts. p. 172 and 180; Louis T. Barin, Defts. p. 224).

The wheels are built to run at medium stages of the water; hence at very high and very low water do not interfere with the catch by other methods (L. Winans, Defts. pp. 200-1).

The defendants did allow the Indians to fish between the wheels, but gave them to understand it was only permission and not as a right (L. Winans, pp. 202-4).

The evidence plainly shows that but for the fencing up of the land, thus closing access to the fisheries, the Indians would have made no complaint as to the wheels (Sam Tan-a-Washa, p. 81).

POINTS AND AUTHORITIES.

I.

Upon the acquisition of the original Oregon territory now including Oregon, Washington, and parts of other states, the United States became invested with the fee of all the

lands and waters included therein. The "Indian title" as against the United States was merely a right to perpetual occupancy of the land, with the privilege of using it as the Indians saw fit, until such right of occupancy had been surrendered to the government; and the Indian title to the reservations was of no higher character.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.
Spalding v. Chandler, 160 U. S. 394, 407 (16 Sup. Ct. Rep. 360).

II.

The Indian title, even to the lands included in their reservation, is subject to the paramount control and power of Congress in the enactment of laws for the sale and disposal of the public lands.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.
Spalding v. Chandler, 160 U. S. 394, 407 (16 Sup. Ct. Rep. 360).
U. S. v. Winans, 73 Fed. 72.
Missouri K. & T. Ry. Co. v. Roberts, 152 U. S. 114 (14 Sup. Ct. Rep. 496).

III.

Under the treaty of 1859, the Indians neither reserved nor did they acquire a title by occupancy to the lands bordering their usual and customary fishing grounds. They acquired merely an executory license or privilege, applying to no certain and defined places, and revocable at will of the United States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever.

U. S. v. Winans, 73 Fed. 72.
U. S. v. Alaska Packers' Ass'n, 79 Fed. 152.
Ward v. Race Horse, 163 U. S. 504 (16 Sup. Ct. Rep. 1076).

IV.

The said treaty of 1859 imposed no restraint upon the power of the United States to sell the lands in controversy, and such a sale under the settled policy of the government,

was a result naturally to come from the advance of the white settlements along the river, and it cannot be assumed that the government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia.

Ward v. Race Horse, 163 U. S. 504 (16 Sup. Ct. Rep. 1078).

V.

The grant of the lands bordering the Columbia River at such fishing places deprived the white citizens of all rights to go over, across, or upon them for the purpose of fishing or erecting buildings or other purposes, and the Indian rights being of no higher nature were likewise revoked and extinguished.

Ward v. Race Horse, supra.
U. S. v. Winans, supra.
The James G. Swan, 50 Fed. 108.
U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.

VI.

Upon the admission of the State of Washington into the federal Union, "upon an equal footing with the original states," she became possessed, as an inseparable incident to her dominion, and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original states.

Shively v. Bowlby, 14 Sup. Ct. Rep. 567, 569, 152 U. S. 1.
Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808, 838).

VII.

The title to the shore and lands under water is incidental to the sovereignty of a state,—a portion of the royalties belonging thereto,—and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such state to determine to what extent the state has prerogatives of ownership. Control and regulation shall

be exercised subject only to the paramount authority of Congress with regard to public navigation and commerce.

Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808, 838).

Shively v. Bowlby, 14 Sup. Ct. Rep. 565, 152 U. S. 1.

VIII.

Evidence of Indians present at the time of the execution of the treaty between the representatives of the United States government and the federated bands of Indians known as the Yakima Nation in 1855 is incompetent and inadmissible when such evidence would tend to vary the plain stipulations of the treaty.

Anderson v. Lewis, 1 Freem. Ch. (Miss.), 178.

Little v. Wilson, 32 Me. 214.

IX.

Where rights of fishing and hunting on the then vacant public lands of the United States were reserved to the whites and Indians "in common," both whites and Indians could use such implements and methods of fishing and hunting in the exercise of their common rights as they saw fit, and the use of fish wheels by the whites in the customary runways of the fish which did not exclude the Indians from fishing elsewhere, would not deprive the Indians of their common right.

ARGUMENT.

1. Before taking up the main legal points upon which respondents believe this case turns, they desire to discuss briefly the questions of fact involved. If this case were to be decided upon questions of fact raised by the pleadings, exclusive of the stipulated amendments, the plaintiffs would fail to make out a case justifying relief. The testimony was taken upon all of the issues, and defendants introduced their evidence upon the theory that, if it should be held that

the Yakima Indians have an unlimited right of fishery in common with the white citizens, at the places in controversy, nevertheless, the operation of fish wheels by defendants, in no way deprived the Indians of their said treaty rights; and the evidence to this effect is conclusive in respondents' favor.

It is not complained that defendants operated said fish wheels in a wrongful or unlawful manner. It does not appear that the wheels killed or materially injured *any passing fish.* It does appear that they are as proper as any other appliance, net or trap which would catch an equal number of fish. In the absence of statutory regulation, either whites or Indians could use any implement or appliance they saw fit, subject only to the restriction that they must not prevent others from doing likewise. In 1855, the Indians were accustomed to fish with spears and crude nets. Inasmuch as white men, even at that time, had several methods of fishing, it can no more be claimed that the whites should discard fish wheels and only use nets and spears, than that the reservation of a hunting right, common to both whites and Indians, should constrain them to discard the firearms of civilization and return to the bow, arrow and flint knife of savagery. The fishing right was in common, and aside from the right of the state to license fish wheels, the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail. Of this the Indians cannot lawfully complain, and they did not complain until excluded from access over the patented lands to the bank of the river. There is nothing in the evidence to show that the Indians could get to said fishing places

otherwise than across said patented lands. Hence, the exclusion of the Indians from the fishing grounds, by preventing them from trespassing, violated no right. If it was impossible for the Indians to go to the fisheries on the shore lands and engage in fishing without crossing the lands of defendants, that is no fault of defendants, and they are neither legally nor morally responsible for that state of things. The *condition of the river*, the swift and swirling nature of the stream in front of said patented lands, prevented fishing from boats, and if the Indians could not fish in the stream at that point, they, like the white citizens of the state can go elsewhere, where the government has not seen fit to convey the lands adjoining the river to private parties, or where they have access to the river without trespassing on private lands.

Another feature that the evidence discloses, is that the places where fish can be caught, along defendants' lands, are not stationary and fixed, but that those fishing there have to move their fishing stands back to the higher lands with the rising, and down again with the falling waters. There are places where, at high water, the fishing would have to be conducted two hundred yards inland from low-water mark. Presumably the same condition of affairs prevails at White Salmon, Cascades, Skin, Celilo, and the other fishing places along the river to which Indians of the Yakima tribe were accustomed to resort. The natural conditions at and surrounding the fishing grounds, the impossibility of granting unlimited and perpetual fishing rights at these places without practically granting ownership or dominion over a considerable space of surrounding territory, lead to the conclusion

that the grant of such unlimited, undefined fishing rights, incapable of exact boundary, was not intended.

But, however the case might have stood under the issues originally presented by the bill and answer, a new element was injected into it by the amendments setting up the fact that defendants operated such fish wheels under license from the state, and also that since the beginning of this suit, they have acquired from the state the shore lands. Respondents claim that these undisputed facts themselves establish their right to absolutely exclude the Indians from the said shore lands and from fishing at the places referred to at any time or in any manner. Hence, whatever the question was before such sale of the shore lands, as the matter stands now, the defendants have complete title and dominion, both from the United States and from the State of Washington, over all of the patented lands and fishing places in controversy, and unless the treaty of 1859 can be construed as granting an unlimited easement to the said Indians to so go upon said lands, erect buildings, pasture horses, and fish in the river from the said shore lands, there is absolutely nothing either in the laws regulating the disposal of public lands in the United States, the enabling act, providing for the admission of Washington into the Union, or in the instruments conveying the title, which in any way limits, controls, or encumbers the full efficiency of the fee simple titles so conveyed.

2. Upon the acquisition of the original Oregon territory, the United States received the fee of all lands and waters included therein.

"The Indian title, as against the United States, was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to-wit: the right to possess and occupy the lands for the uses and purposes designated."

Spalding v. Chandler, 160 U. S. 394 (16 Sup. Ct. Rep. 360).

By the treaty of 1859 the Yakima nation effectually surrendered its "Indian title" of occupancy to the United States. No claim is made that under the treaty they reserved not only their "Indian title" to the reservation, but also their "Indian title" to the unoccupied and vacant lands of the United States whereon they were permitted to hunt, pick berries, pasture horses and erect temporary buildings for curing fish, or to their usual and accustomed fishing places. It might as well be contended that they reserved such right or title to public highways, which they were allowed to travel in common with white citizens.

But, even if such title was reserved, it was subject to the paramount control and power of Congress to invade the sanctity of the reservation, even against the consent of the Indians, for if a grant necessarily includes the possession of a portion of a reservation, the effect of the grant is to extinguish so much of the reserve as was embraced in the grant.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.

Spalding v. Chandler, supra.

U. S. v. Winans, 73 Fed. 72.

Missouri K. & T. Co. v. Roberts, 152 U. S. 114 (14 Sup. Ct. Rep. 496).

Consequently, the patenting of the lands described in the complaint and answer to the predecessors of defendants, conveying the full legal and equitable title, effectually disposed of whatever Indian claims existed as to the patented lands.

Under the treaty of 1859, the Indians acquired a mere executory license or privilege, revocable at will of the United States, to fish, hunt, pasture horses, gather berries and build temporary houses for curing fish, in common with the white citizens, on vacant public lands. The white citizens have always had such rights, but the law conferred on them no title by occupancy whatever. If we apply the maxim—"things equal to the same thing are equal to each other," the Indians acquired only the rights conceded to belong to white citizens, to hunt and make temporary dwellings on vacant and unoccupied land, and to fish in navigable waters (U. S. v. Winans, 73 Fed. 72). The white citizens never had a right to trespass on patented lands in the exercise of their undoubted common right of fishery in navigable waters, and the Indians could have no greater right.

"Above high-water mark the soil is the exclusive property of the riparian proprietor, and the public have no right to go upon it for the purpose of fishing, or drawing seines upon it, or of doing any other act that pertains to the public right of fishing. Such rights belong exclusively to the riparian proprietors."

13 Am. & Eng. Ency. of Law (2d ed.), pp. 565-566 and cases cited.

Under the treaty, the whites could not trespass on the Indians' exclusive rights in their reservation, and it could not have been intended that the Indians should have greater rights

in the white man's "reservation,"—the lands ceded to the government, than the white man himself had.

But respondents contend that the Indian rights and privileges in controversy, were but licenses, revocable at will.

"A license is technically an authority given to do some one act, or series of acts, on the land of another, without possessing any estate in the land."
Cook v. Stearns, 11 Mass. 533.

The treaty provides, Art. III.—"The *exclusive* right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians * * *." This is followed by the provision,—"as also the right of taking fish at all usual and accustomed places, in *common with citizens of the territory*, and of erecting *temporary* buildings for curing them; together with the privilege of hunting, gathering roots and berries and pasturing their horses and cattle upon open and unclaimed land."

As said by Judge Hanford, U. S. v. Winans, 73 Fed. 74, "The enumeration of other rights secured to the Indians by express words negatives any possible presumption of rights by mere implication; for the rule is *expressio unius est exclusio alterius.*"

Article II secures to the Indians the right *in common* with citizens of the United States, to travel upon all public highways. Do appellants contend that this deprived the state of the power to alter or abolish highways? If the citizen could not complain of such action by the state, could the Indians complain?

Against the contention that said treaty conferred an easement on the Indians for the purposes indicated, we merely say that an *easement involves an interest in land*,—a license, revocable at will, does not. Here no interest in land is conferred. There are no words used which could possibly create such an interest in a contract between private parties, first, because of the indefiniteness of the stipulation as to the places intended to be subjected to the easement, and second, because the rights and privileges granted were merely personal to the members of the tribe, unassignable, and have to do with acts to be done by them, and not with land. They are given the right to erect *temporary* buildings for curing fish. This clearly indicates that the Indians' rights were temporary, and excludes the idea of permanent occupancy or of an easement.

If, as respondents contend, said stipulations conferred only a license to fish, with right to erect temporary structures only, and hence conveyed no interest in said patented lands, the grant of the same by the United States, and the grant of the shore land by the state, operated as a revocation of said license, as to the lands so granted.

In Eisenbach v. Hatfield, 2 Wash. 237, the Supreme Court of Washington held that the state has full power to dispose of its tide lands, subject only to the restrictions imposed by the constitution of the state and of the United States; that the act of the territorial legislature permitting the riparian owners to build wharves in front of their premises, was but an executory license, and, until availed of, was revocable, and that the state constitution and subsequent laws extinguished the license.

To the same effect is Shively v. Bowlby, 14 Sup. Ct. Rep. 568, 152 U. S. 1.

If the treaty in question had given the Indians a right to erect permanent structures, and they had exercised this right, it might be contended that a subsequent sale by the state or nation would be subject to it. But the rights conferred were merely personal, executory and floating,—could not, by the terms of the treaty, become executed, vested rights, and hence the patents from the general government, the provisions in the state constitution and its laws thereunder, and the state's grant of the shore lands, effectually extinguished such rights.

Upon the admission of Washington into the federal Union, "upon an equal footing with the original states," she became possessed, as an inseparable incident to her dominion and sovereignty, of all the rights, as to the sale of shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original states, whose dominion and sovereignty in these respects came into being when America severed her connections with the British crown.

Shively v. Bowlby, 14 Sup. Ct. Rep. 567, 569, 152 U. S. 1.

Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808-838).

That the right of common fishery by the public in navigable waters is subject to state regulation and control, is nowhere denied, and is a settled principle, both of policy and jurisprudence, in the American scheme of the division of sovereignty between national and state governments. The title to the shore, and the lands under the water, is incidental to

the sovereignty of the state, a portion of the royalties belonging thereto,—and held in trust for purposes of public navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such state to determine to what extent the state has prerogatives of ownership. Its control and regulation are subject only to the paramount authority of Congres with regard to public navigation and commerce.

The only cases in which Congress can retain or grant out to individuals such incidents of sovereign power, are those specified in Shively v. Bowlby, 14 Sup. Ct. Rep. 566, where the Supreme Court, per Mr. Justice Gray, said:

We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

But Congress has never undertaken, by general laws, to dispose of such lands, and the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or jus privatum, of the king or his grantee, was, in the phrase of Lord Hale, "charged with and subject to that jus publicum which belongs to the king's subjects," or, as he elsewhere puts it, "is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with the kingdom are interested by reason of common commerce, trade and intercourse": Harg. Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the king, in his public and regal character, as the representative of the nation, and in trust for them;" and the title and the dominion of the tide waters, and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of

the new community about to be established, and, upon the American revolution, vested absolutely in the people of each state, "for their own common use, subject only to the rights since surrendered by the constitution to the general government": Martin v. Waddell's Lessee, 16 Pet. 367, 409-411. As observed by Mr. Justice Curtis, "This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights": Smith v. Maryland, 18 How. 71, 74. "The title to the shore and lands under tide water," said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery": Harvin v. Jordan, 140 U. S. 371, 381, 11 Sup. Ct. Rep. 808, 838. And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tide waters, and the lands under them, are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future states": Pollard's Lessees v. Hagan, 3 How. 212, 221, 222; Weber v. Commissioners, 18 Wall. 57, 65; Knight v. Association, 142 U. S. 161, 183, 12 Sup. Ct. 258.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some *international duty or public exigency*, shall be held by the United States *in trust for the future states*, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose

of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

The granting to an Indian tribe of an unlimited right of fishery in navigable waters, held in trust for the people of the future State of Washington by the United States, would not be "in case of some international duty or public exigency." But, if it be conceded that such an unlimited right of fishery was or could be granted by the said treaty, it is elementary that an act of Congress may supersede and repeal a treaty.

Fong Yue Ting, v. U. S., 149 U. S. 698, 13 Sup. Ct. Rep. 1016.

The Cherokee Tobacco, 11 Wall. 621.

Construing the provision in the treaty of February 24, 1869, with the Bannock tribe of Indians, "that they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting district, the Supreme Court, through Mr. Justice White, said:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservations whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty, if it was so construed as to allow the Indians to seek out every unoccupied piece of government land, and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union was merely declaratory of the general rule."

Ward v. Race Horse, 16 Sup. Ct. Rep. 1078.

To suppose that the treaty with the Yakimas, instead of creating a mere license, temporary in character, liable to destruction if the needs of commerce and civilization required, created permanent easements in the lands and fishing grounds covering a large part of the course of the upper Columbia river, would render necessary the assumption "that Congress, while preparing the way, by the treaty, for new settlements and new states, yet created a provision, not only detrimental to their future well being, but also irreconcilably in conflict with the powers of the states already existing."

Ward v. Race Horse, supra.

The constitution of Washington provides, Article XVII: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in this state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided that this section shall not be so construed as to debar any person from asserting his claim to vested rights in the courts of the state."

Pursuant to laws passed in accordance with said provision, the state sold the shore lands involved herein to defendants (Trans. p. 229), and the fish wheels were operated by defendants under licenses issued pursuant to law (Trans. p. 246, 247 and 248).

The state having determined, both by said constitutional provisions, and its laws for licensing fish wheels and the sale of shore lands, to what extent its prerogatives in said respects shall be exercised, appellants cannot complain.

In the court below, testimony was given by a number of old Indians to the effect that in the discussions preceding

their adoption of the treaty of 1859, it was understood that they were to have their accustomed fisheries as their own forever (White Salmon Charley, p. 72, Trans.). As testimony of this character is in direct conflict with the treaty stipulations, it is clearly incompetent and inadmissible.

A treaty is a contract, and its provisions can no more be varied by parol evidence of the prior intentions of the parties, than can the terms of a written instrument between private parties.

In Anderson v. Lewis, 1 Freem. Ch. (Miss.) 178, construing a treaty between the government and the Chickasaw Nation, reserving to each male and female of the tribe a section of land within the territory, the court said:

"When individual rights vest under a treaty, its meaning, in reference to them, is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. It must receive such construction as will best effectuate the intention."
Citing Vattel, Ch. 17.

Construing the treaty of Washington (1842), which asserted that part of the boundary line between the United States and New Brunswick was never ascertained and determined, the Supreme Court of Maine, in Little v. Wilson, 32 Me. 214, held that where the language used in a treaty clearly declares a fact, or grants, confirms or defines a right, it must be effectual, even if found to be inconsistent with the purposes disclosed by correspondence which preceded it, and said:

"A judicial tribunal would not be authorized to limit the plain and unrestricted language of a treaty to the accomplishment only of the particular purposes which induced the parties to introduce each article. The intention is to be

ascertained rather from the ambiguous language finally agreed upon, than from the anterior correspondence."

There are no ambiguous terms in the treaty of 1859. The rights granted to the Indians were to fish and hunt in common with the white citizens on vacant and unoccupied public lands; the grant of the right to erect temporary structures excluded the idea of permanence, and prevented them from acquiring vested rights, such as a riparian owner acquired by building a wharf into the stream in front of his lands.

But, apart from the rule rendering such testimony incompetent, the historical facts, contemporaneous with the signing and ratification of the treaty, plainly support respondents' construction. In 1855 the white settlers were advancing in fast augmenting numbers to the valleys of the Willamette and Columbia. Their clearings could be seen in every direction. It was manifest both to the Indians and to the government, that the Oregon country was destined to be the home of an energetic, enlightened people, who would surely leave undeveloped no hidden resources of land, sea or stream. The Indians had already felt the might of the whites and knew both their intellectual and physical superiority. Almost unseen by the government at Washington, the hardy pioneers, with rifles, families and a few of the seeds and implements of husbandry, had "trekked" across the wilderness, and during the time of joint occupation of the country, with Great Britain, had established a provisional government, based upon the common law, the American constitution and the ordinance of 1787. When the joint occupation ended, and the title of the United States to the country became single, they found

it in the firm grasp of law and order, with the foundations of church and state and commerce already established. It cannot be supposed that at such a time, while the last march of our state builders was going on, our government sanctioned a treaty deliberately intended to curtail the rights of the future state, to deprive it of equality with the original states, to repudiate its trust obligation to transfer the shore lands of navigable waters and the right to control and regulate fishing therein, unimpaired to the people of the state, and to limit the future development of their fishing industries.

Wherefore respondents ask that the decree of the Circuit Court be affirmed.

Respectfully submitted.

CHAS. H. CAREY, F. P. MAYS, and

HUNTINGTON & WILSON,

Solicitors for Defendants and Respondents.

Supreme Court of the United States.

No. 180.—October Term, 1904.

The United States, Thomas Simpson, and White Swan, Appellants,
vs.
Lincas Winans and Audubon Winans, Partners, doing business under the firm name of Winans Brothers.

Appeal from the Circuit Court of the United States for the District of Washington.

[May 15, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

There is no substantial dispute of facts, or none that is important to our inquiry.

The treaty is as follows:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish and convey to the United States all their right, title and interest in and to the lands and country occupied and claimed by them. . . .

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians the tract of land included within the following boundaries: . . .

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time and not included in the reservation above named. . . .

"Article III. And provided that, if necessary for the public convenience, roads may be run through the said reservation; and, on the other hand,

the right of way, with free access from the same to the nearest public highways, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries and pasturing their horses and cattle upon open and unclaimed land. . . .

"Article X. And provided that there is also reserved and set apart from the land ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fisheries,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." (12 Stat. 951.)

The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia River and under grants from the State of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the State to maintain devices for taking fish, called fish wheels.

At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. Before filing their answer respondents demurred to the bill. The court overruled the demurrer, holding that the bill stated facts sufficient to show that the Indians were excluded from the exercise of the rights given them by the treaty. The court further found, however, that it would "not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing." (73 Fed. Rep. 72.) The injunction that had been granted upon the filing of the bill was modified by stipulation in accordance with the view of the court.

Testimony was taken on the issues made by the bill and answer, and upon the submission of the case the bill was dismissed, the court applying the doctrine expressed by it in *United States* v. *Alaska Packers' Ass'n*,

(79 Fed. Rep. 152;) *United States* v. *Swan*, (50 Fed. Rep. 108,) expressing its views as follows:

"After the ruling on the demurrer the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfere with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands, to which a perfect absolute title has been acquired from the United States Government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to do so. The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." (119 U. S. 1; 175 U. S. 1.) How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not

be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

The respondents urge an argument based upon the different capacities of white men and Indians to devise and make use of instrumentalities to enjoy the common right. Counsel say: "The fishing right was in common, and aside from the right of the State to license fish wheels the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail." But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides, the fish wheel is not relied on alone. Its monopoly is made complete by a license from the State. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the

Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, (152 U. S. 1.) It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"Notwithstanding the dicta contained in some of the opinions of the court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true.

* * * * * *

"By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. (*American Ins. Co.* v. *Canter*, 1 Pet. 511, 542; *Benner* v. *Porter*, 9 How. 235, 242; *Cross* v. *Harrison*, 16 How. 164, 193; *National Bank* v. *Yankton County*, 101 U. S. 129, 133; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *McAlister* v. *United States*, 141 U. S. 174, 181.")

Many cases were cited. And it was further said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The license from the State, which respondents plead to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the State to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. And that there may be an adjustment and accommodation of them the Solicitor General concedes and points out the way. We think, however, that such adjustment and accommodation are more within the province of the Circuit Court in the first instance than of this court.

Decree reversed and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice WHITE dissents.

True copy.

Test:

Clerk Supreme Court, U. S.